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A

Treatise on the Law of

VENDOR AND PURCHASER

OF

REAL ESTATE AND CHATTELS REAL,

INTENDED FOR THE USE OF

CONVEYANCERS

OF EITHER BRANCH OF THE PROFESSION.

BY

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TEMPLE MIDDLE

THIRD EDITION.

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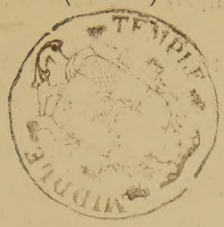

PREFACE

TO THE SECOND VOLUME OF THE THIRD EDITION.

THE decision of Mr. Justice P. O. Lawrence and of the Court of Appeal in *Craddock Bros., Ltd.* v. *Hunt* (*a*) has now established as law the point submitted in the former editions of this book to be the right rule; namely, that a claim may well be enforced by one suing *as plaintiff* for the rectification on parol evidence of a written agreement together with the specific performance of the agreement as rectified (*b*).

The cases decided and statutes passed during and after the late war with respect to the property and contracts of alien enemies have been duly cited and noticed (*c*). The alteration made by the Wills (Soldiers and Sailors) Act, 1918 (*d*), in the law of the exercise of powers by infants has been noted (*e*). And the effect of the recent decisions with regard to infants' and married women's fraud in connection with their contracts has been stated (*f*).

The paragraph (*g*) on the conveyance *ultra vires* and the purchase *ultra vires* of land by a statutory corporation is new.

(*a*) 1922, 2 Ch. 809; 1923, W. N. 63, 67 Sol. J. 593.
(*b*) Below, p. 777.
(*c*) Below, pp. 835, 872—878.
(*d*) Stat. 7 & 8 Geo. V. c. 58.
(*e*) Below, p. 851.
(*f*) Below, pp. 849, 850, 909.
(*g*) Below, p. 920.

The submissions made in the former editions of this book with respect to the devolution of the lands of a corporation upon its dissolution, and the author's criticism of the decision in *Hastings Corporation* v. *Letton* (*h*), are adhered to, notwithstanding that that decision has since been followed (without any inquiry into the reasons for supporting it) by the Court of Appeal (*i*).

The paragraphs (*k*) on foreign corporations, and on corporations created in the King's dominions outside England, are new; and the nature of unincorporated societies has been more fully stated (*l*).

The recent decisions on the discharge of a contract, before breach, by implied waiver, have been duly noticed (*m*). And the paragraph (*n*) on the limitation of actions against a paid vendor remaining in possession is new.

The text and notes (*o*) respecting the recovery by a vendor of the amount of a deposit, which has been stipulated for, but not paid, and dealing with the retention of the deposit by a vendor affirming the contract, and claiming damages thereunder for a breach of contract, are new. And the author's criticism in the previous editions of this book of the case of *Jackson* v. *De Kadich* (*p*) has been approved of, and followed by Eve, J. (*q*) and Sargant, J. (*r*).

(*h*) 1908, 1 K. B. 378.

(*i*) In *Re Woking, &c. Act* (1911), 1914, 1 Ch. 300; see below, pp. 932—936.

(*k*) Below, pp. 937—940.

(*l*) Below, p. 940.

(*m*) Below, pp. 978, 979.

(*n*) Below, p. 1010.

(*o*) Below, pp. 1015, and n. (*e*); 1020, and n. (*f*); 1024, and n. (*m*).

(*p*) 1904, W. N. 168.

(*q*) *Hall* v. *Burnell*, 1911, 2 Ch. 511.

(*r*) *Farrant* v. *Olver*, 1922, W. N. 47, 127 L. T. 145; see below, pp. 1015, 1016, and n. (*f*).

The author's contention in the previous editions of this book, that neither a vendor nor a purchaser recovering substantial damages for a breach of the contract, is entitled to recover his expenses of the sale as well, is now supported by the decisions in *Faber* v. *Keck* (*s*) and *Re Daniell* (*t*). And the question, what is the true measure of the vendor's damages for the purchaser's breach of the contract, has been reconsidered, and the rule (as now conceived to be correct) has been newly stated (*u*).

The paragraph (*x*) on bribes given by one party to the other's agent is new.

The alterations in the law as to succession and estate duty in respect of woodlands (*y*), as to the abolition of settlement estate duty (*z*), and as to estate duty on personalty appointed by will in exercise of a general power of appointment (*a*), are duly noted. And the late Irish decision, that the payment of succession and estate duty should be stated in the abstract, and must be proved at the vendor's expense, is stated and is submitted, as regards the production of evidence of payment, which is not in the vendor's possession, to be wrong (*b*).

Increment Value Duty payable on death, though now abolished, has left a permanent mark on the law (as the War legislation has (*c*)); and it has been found impossible to omit some account of it (*d*).

(*s*) 60 Sol. J. 253.

(*t*) 1917, 2 Ch. 405; see below, pp. 1025, 1032—1034.

(*u*) Below, pp. 1025—1027.

(*x*) Below, p. 1050.

(*y*) Below, pp. 1199, n. (*n*), 1222, n. (*n*).

(*z*) Below, pp. 1231—1233.

(*a*) Below, p. 1242.

(*b*) Below, pp. 1217, 1218, 1250.

(*c*) See above, vol. 1, p. viii.

(*d*) See below, pp. 1251—1255.

Mr. H. Ernest Glaisyer is responsible for the table of contents and all the indexes, as well as for the corrections of the press. Owing to the present cost of printing, the publishers have been obliged to omit the references, which were given in the second edition, to all the reports of the cases cited. But the dates of all the cases have been retained in the index in order to assist the reader in finding alternative reports.

The *Addenda* include all cases relevant to the matters discussed both in this and in the first volume, which have been reported up to the date given below.

7, Stone Buildings, Lincoln's Inn,
18*th June*, 1923.

PREFACE

TO THE SECOND VOLUME OF THE FIRST EDITION.

THE order of the subjects proposed for consideration in Volume II. has been changed since the publication of Volume I. The second volume begins with the discussion of the grounds for avoiding the contract, and then treats successively of Mistake, Fraud, Misrepresentation, Duress and Undue Influence, Illegality in the Contract, and Personal Incapacity. Then come chapters on Incapacity in equity arising from the relations between the parties (such as the disability of a trustee or an agent for sale); on the Discharge of the Contract; and on the Remedies for breach of the contract, including the consideration of the remedies available in any respect after completion of the purchase. And the book ends with a chapter on the Sale of Registered Land (*a*).

The writer has pursued the plan adopted in the first volume of not avoiding the discussion of difficult or doubtful points. These have proved to be so numerous that his adherence to this design has certainly contributed to retard the completion of his treatise: but for this he hopes to meet with the reader's indulgence. He may mention that at the very outset he has found himself beset with many doubts and difficulties as to the true theory of English law with respect to mistake as a ground of avoiding a contract. The view he has put forward is warranted, he believes, by the English authorities; and it is supported by the statements made in the late Mr. Benjamin's classical treatise on Sale. On the other hand, it seems to conflict with the opinion maintained by Mr. Justice O. W. Holmes, of the Supreme Court of the United

(*a*) In the second and in this edition, the chapter on the Death Duties is transferred to the end of the second volume.

States, who is perhaps the most brilliant and original of all living writers on the Common Law, and with that adopted by Professor Holland. And it is with extreme diffidence that the writer ventures to criticise their conclusions (*b*). The question, how far mistake is available, either as a ground of avoiding a contract for the sale of land at law, or of resisting its specific performance in equity, was raised in an acute form in the recent case of *Van Praagh* v. *Everidge* (*c*), which unfortunately went off in the Court of Appeal on the point of non-compliance with the 4th section of the Statute of Frauds. The writer has fully discussed this case in both of these aspects (*d*). Another difficult point, relating partly to the law of mistake and partly to that of misrepresentation, is the effect upon the contract at law and in equity of non-disclosure by the vendor of a latent defect of quality, of which he is aware; and the authorities on this point have been carefully considered (*e*). A full examination has been made of the questions, whether one may well claim the rectification of a written executory agreement together with the specific performance of the agreement as rectified (*f*), and whether rectification ought ever to be granted where the mistake has been unilateral and not common to both parties (*g*). In connection with these questions, the cases of *May* v. *Platt* (*h*), *Garrard* v. *Frankel* (*i*), *Harris* v. *Pepperell* (*k*), *Bloomer* v. *Spittle* (*l*), and *Paget* v. *Marshall* (*m*), have been criticised. Under the head of fraudulent misrepresentation, the much discussed case of *Cornfoot* v. *Fowke* (*n*) has been considered; and it is suggested that the decision there given may yet be in point where an agent has innocently and without express authority made a false statement as to some fact, on which his principal was accurately informed, and it is sought on this ground to set aside the contract after completion (*o*).

The writer has entered a strong protest (*p*) against the acceptance

(*b*) See pp. 741—744, and n. (*m*).
(*c*) 1902, 2 Ch. 266; 1903, 1 Ch. 434.
(*d*) Pp. 751, 752, 765, and n. (*d*).
(*e*) See pp. 755—761.
(*f*) Pp. 773—777.
(*g*) Pp. 779—786.
(*h*) 1900, 1 Ch. 616.
(*i*) 30 Beav. 445.
(*k*) L. R. 5 Eq. 1.
(*l*) L. R. 13 Eq. 427.
(*m*) 28 Ch. D. 255.
(*n*) 6 M. & W. 358.
(*o*) Pp. 802 and n. (*t*), 805, 806.
(*p*) P. 847, n. (*m*).

as law of the decision of Bacon, V.-C., in *Taylor* v. *Johnston* (*q*) that an infant is capable of making a perfectly valid gift of money or other choses in possession; he has remarked upon the oft-cited but probably misreported *dictum* of Lord Mansfield in *Buckinghamshire* v. *Drury* (*r*); and he has discussed the question, whether an infant, who has purchased land assured to him in fee simple, can recover the purchase-money if he elect to avoid the conveyance (*s*). Under the head of the incapacity of married women (a subject of the most appalling intricacy), it is submitted that the inconvenient consequences of the decision in *Re Harkness and Allsopp's Contract* (*t*) are not so easily obviated as might be supposed from the decision of Farwell, J., in *Re West and Hardy's Contract* (*u*); that a subsequent purchaser's objection to a conveyance by a married woman alone is not removed by the fact that he has no notice that she was a trustee; and that, as the Married Women's Property Act, 1882, only confers on wives a special and not a general capacity to alienate their lands, it is incumbent on any person making title through a conveyance by a married woman alone to prove either that she was entitled to the estate assured as her separate property, or that, if she were a trustee thereof, she had power to convey the same as a bare trustee (*x*). It is contended that the decision of Chitty, J., in *Re Hodson* (*y*), as to the capacity of a married woman to confirm or avoid her voidable conveyance or contract made whilst she was an infant and single, is at variance with the earlier authorities on this point in equity as well as at law (*z*); and further, that the *principle* followed by the Court of Appeal in *Viditz* v. *O'Hagan* (*a*), with regard to the incapacity to consent imposed on a wife by Austrian law, is exactly the same as that which determined the rule of the English common law (*b*). And attention has been called to the unsatisfactory state of the authorities with respect to the devolution, when a corporation is dissolved, of lands of which it was seised in fee; a point of prac-

(*q*) 19 Ch. D. 603.
(*r*) 2 Eden, 60, 72.
(*s*) Pp. 848, n. (*m*), 859, 860.
(*t*) 1896, 2 Ch. 358.
(*u*) 1904, 1 Ch. 145.
(*x*) Pp. 893—895. (See now the amending Act stated and discussed on pp. 895—897.)
(*y*) 1894, 2 Ch. 421.
(*z*) P. 912, and n. (*y*).
(*a*) 1900, 2 Ch. 87.
(*b*) P. 913, n. (*z*).

tical importance owing to the frequent dissolution of companies after being wound up (*c*).

In dealing with the subject of relative disability in equity (*d*), the writer has put forward a threefold classification in preference to that adopted by Mr. Dart. In connection with the discharge of the contract, he has discussed the question, whether the parties are entitled to *restitutio in integrum* where a contract partly performed is discharged by mutual assent (*e*); he has also examined the subject of discharge for impossibility of performance (*f*). Under the head of the remedies for breach of the contract (*g*), he has placed first, as a substantive remedy in itself, rescission grounded on the opposite party's breach of an essential stipulation in the agreement; and he has maintained (*h*) that in this case, as in all other cases of rescission, the rule is that it must be accompanied by *restitutio in integrum*. An exception however occurs with regard to a deposit paid as a guarantee for due performance of the contract; and it is contended (*i*), in opposition to the ruling of Farwell, J., in *Jackson* v. *De Kadich* (*k*), that this exception equally exists, where the deposit has been paid to a stakeholder. The writer has particularly dealt with the cases of re-sale after a rescission of the contract, under an express power of re-sale (*l*), and after an action for damages for breach of the agreement (*m*). He has contended (*n*) that, where a purchaser can recover substantial damages for loss of his bargain, he cannot *also* claim to be recouped his expenses incurred under the contract; although such a claim was by inadvertence actually followed in *Engel* v. *Fitch* (*o*), and was admitted in *Godwin* v. *Francis* (*p*). The true principle appears to have been applied by the Court of Appeal in *Day* v. *Singleton* (*q*), but the head-note to that case does not correctly represent the effect of their judgment. The writer has considered (*r*) the effect of a judgment for damages or specific

(*c*) Pp. 932 *sq.*
(*d*) Pp. 947 *sq.*
(*e*) P. 982.
(*f*) Pp. 983 *sq.*
(*g*) Pp. 1011 *sq.*
(*h*) P. 1015.
(*i*) P. 1016, n. (*f*).
(*k*) 1904, W. N. 168.
(*l*) Pp. 1019—1021.
(*m*) P. 1040.
(*n*) P. 1032.
(*o*) L. R. 4 Q. B. 659.
(*p*) L. R. 5 C. P. 295.
(*q*) 1899, 2 Ch. 230.
(*r*) Pp. 1034—1038.

performance in barring the alternative remedy, and the effect of the dismissal of a claim for specific performance on the remedy in damages. And in examining the latter remedy he has given (*s*) an analysis of the defences which are available to an action for damages for breach of the contract; and has added (*t*) a summary of the law determining the parties' position, where one of the signatories to the memorandum professes or is alleged to have signed as agent for another person.

In discussing the remedy by suing for specific performance of the contract (*u*), the writer has made no attempt to compile a manual of practice, but has confined himself to endeavouring to ascertain what are the essential points of difference between this remedy and that by action for damages at law. On the other hand, in describing the proceedings by vendor and purchaser summons (*x*), he has gone into points of practice; this being now the normal remedy for settling disputes on any conveyancing points arising out of the contract. The chapter on the parties' Remedies concludes with an account of the purchaser's remedies for disturbance after completion (*y*), especially under covenants for title (*z*); and the writer has especially discussed the questions, whether acts not affecting the title or possession can be a breach of a covenant for quiet enjoyment (*a*), criticising particularly (*b*) the case of *Sanderson* v. *Mayor of Berwick-on-Tweed* (*c*), and what is the true measure of damages for breach of the various covenants for title (*d*). On one important point connected with this last subject he regrets to find his opinion in conflict with that of the learned author and editor of Mayne on Damages (*e*).

One of the main causes of the writer's delay in completing this volume has been the last chapter on the Sale of Registered Land, which has far exceeded its estimated limits. He has nevertheless tried to be as brief as is compatible with any real discussion of this very complicated and difficult branch of the law. And, although

(*s*) P. 1038.
(*t*) Pp. 1040 *sq.*
(*u*) Pp. 1051 *sq.*
(*x*) Pp. 1076 *sq.*
(*y*) Pp. 1085 *sq.*
(*z*) Pp. 1087 *sq.*
(*a*) Pp. 1097, 1098.
(*b*) P. 1097, n. (*m*).
(*c*) 13 Q. B. D. 547.
(*d*) Pp. 1101—1105.
(*e*) P. 1105, n. (*s*).

the subject of the mortgage of registered land hardly comes within the scope of this treatise, he has been obliged to devote some pages (*f*) to its discussion in order to explain the particular difficulties now attendant on the sale, followed by an immediate mortgage, of registered land (*g*) and unregistered land situate in a compulsory registration district (*h*). Here again he regrets to find his opinion conflicting with that of eminent lawyers on important points (*i*), and to be obliged to advise against the safety of a very convenient course, which other practitioners have recommended (*k*).

The writer's criticism contained in the first volume (*l*) of the grounds given for the decision of Swinfen Eady, J., and the Court of Appeal in *Re Highett and Bird's Contract* (*m*) has lately been justified by the explanation of that case given by Lord Justice Romer in his judgment in *Re Allen and Driscoll's Contract* (*n*).

7, Stone Buildings, Lincoln's Inn,
15th December, 1905.

(*f*) Pp. 1173—1179.
(*g*) Pp. 1183—1185.
(*h*) Pp. 1185 *sq.*
(*i*) See pp. 1173, n. (*b*), 1175, n. (*j*).
(*k*) See p. 1184, n. (*d*).
(*l*) Pp. 343—345.
(*m*) 1902, 2 Ch. 214; 1903, 1 Ch. 287.
(*n*) 1904, 2 Ch. 226, 231.

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APPENDIX D.

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ERRATA.

Vol. I., p. 21, note (*z*).—Insert, after *Johnston* v. *Boyes*, "1899, 2 Ch. 73," and delete "where the purchaser stood by while the auctioneer's clerk."

Vol. I., p. 248, note (*o*), line 4.—For "1893" read "1896."

Vol. I., p. 414, note (*k*).—For "*Collins* v. *Amphlett*" read "*Collis* v. *Amphlett*."

Vol. I., p. 415, note (*a*).—For "*Hyett* v. *Makin*" read "*Hyett* v. *Mekin*."

Vol. I., p. 646, note (*k*).—For "32 Ch. D. 106" read "33 Ch. D. 106."

Vol. I., p. 661, note (*y*).—For "*Lumsden Case*" read "*Lumsden* v. *In. Rev. Commrs.*"

Vol. I., p. 662, note (*y*).—For "*Ecclesiastical Commissioners' Case*" read "*Ecclesiastical Commrs.* v. *In. Rev. Commrs.*"

Vol. II., p. xxiii.—For the last two sentences in the first column, substitute:

"If waiver of the old be a term of the new contract, it may be proved by parol" 979

All *alterations* of the contract must be put in writing and signed 979

Vol. II., p. 877, note (*k*), line 5.—For "26" read "56."

Vol. II., p. 1158, note (*s*).—The reference should be to p. 1153, note (*z*).

Vol. II., p. 1247, lines 10, 11.—Transpose the words "in respect of any personal property comprised therein" to after "1914."

ADDENDA

To Volumes 1 *and* 2.

Pages 4, notes (*j*, *l*), 7, note (*h*).—Add: "*Allsopp* v. *Orchard*, 1923, 1 Ch. 323."

Page 5, note (*p*).—Add: "Cf. *Allsopp* v. *Orchard*, 1923, 1 Ch. 323, 330."

Page 10, note (*f*).—Add: "*Horner* v. *Walker*, 1923, W. N. 159."

Page 18, note (*k*).—Add at end: "And see the report of *Chillingworth* v. *Esche*, 1923, 1 Ch. 576, 580, in 67 Sol. J. 556, where the purchaser signed a document agreeing to buy certain land 'subject to a proper contract to be prepared by the vendor's solicitors' and acknowledging that he had paid 240*l*. 'as deposit and in part payment of the said purchase money'; and the vendor gave an independent receipt for the deposit 'on sale'; and Astbury, J., said that it was very doubtful into which of the two classes of cases referred to by Parker, J., in *Von Hatzfeldt-Wildenburg* v. *Alexander*, 1912, 1 Ch. 284, the present case fell. As to the actual decision in this case, see below, p. 29, *Addenda*."

Page 19, note (*l*).—Add at the end of the first paragraph, after "disapproved": "And see *Chillingworth* v. *Esche*, *ubi sup.*, stated in the previous note."

Page 29.—Add in the text at the end of the first paragraph, after line 7: "Where a deposit is paid by a proposed purchaser as part of an agreement (not being a firm contract to buy) that the parties shall enter into a future formal contract for the sale of certain land, it appears that, if the payee insist on the execution by the payer of a contract containing unreasonable terms, such as could not have been contemplated by the agreement, the payer is entitled to recover the deposit (y^2). But it has been held that, if the payee do not insist on any unreasonable terms, but tender and offer to execute a contract, which is in all respects a proper one, having regard to the terms of the agreement, and the payer refuse to execute the contract, the payee, having carried out all that was contemplated by the agreement as his part of it, is entitled to retain the deposit (y^3)."

(y^2) *Moeser* v. *Wisker*, L. R. 6 C. P. 120.
(y^3) *Chillingworth* v. *Esche*, 1923, 1 Ch. 576; 67 Sol. J. 556, stated above, p. 18, n. (*k*), *Addenda*.

Page 60, note (*g*).—Add a reference to *Re Courcier and Harrold's Contract*, 1923, 1 Ch. 565.

Page 163, line 21 and note (*h*).—The Agricultural Holdings Acts, 1908 to 1920, have all been repealed (save sect. 11 and part of sect. 33 and the First Schedule of the Act of 1920) by and consolidated in the Agricultural Holdings Act, 1923, stat. 13 & 14 Geo. V. c. 9; see sect. 58 (3) and Fourth Schedule. Stat. 8 Edw. VII. c. 28, s. 48 (1), is now replaced by 13 & 14 Geo. V. c. 9, s. 57 (1). Sect. 11 of the Agriculture Act, 1920, stat. 10 & 11 Geo. V. c. 76, remains in force: but sect. 12 of that Act is now replaced by 13 & 14 Geo. V. c. 9, s. 14.

Page 163, note (*i*).—Stats. 8 Edw. VII. c. 28, s. 1, and 10 & 11 Geo. V. c. 76, 1st Sched., are now replaced by 13 & 14 Geo. V. c. 9, s. 1.

Page 163, line 24 and note (*k*).—Sects. 10, 12 and 13 of the Agriculture Act, 1920, stat. 10 & 11 Geo. V. c. 76, are now replaced by sects. 12, 14 and 23 respectively of stat. 13 & 14 Geo. V. c. 9. Sect. 11 of the Act of 1920 still remains in force.

Page 164, note (*l*).—Stat. 8 Edw. VII. c. 28, s. 10, is now replaced by 13 & 14 Geo. V. c. 9, s. 11.

Page 164, note (*m*).—Stats. 8 Edw. VII. c. 28, ss. 1, 10, 14, 15, 35, 48, and 10 & 11 Geo. V. c. 76, ss. 10, 12, 13, are now replaced by 13 & 14 Geo. V. c. 9, ss. 1, 11, 19, 20 (sub-ss. 1—3), 41, 57, and ss. 12, 14 and 23 of that Act respectively. Stat. 10 & 11 Geo. V. c. 76, s. 11, and 1st Sched., still remain in force.

Pages 201, note (*m*), 216, note (*t*).—Add: "It has now been decided that an executor of a testator, who died (since 1897) seised of an undivided share of freehold hereditaments, has power by law to concur with the owners of the other undivided shares in executing a deed of partition. This was so held on the ground that the exercise of such a power is a proper and reasonable step towards beneficial realisation of the assets of the testator: *Re Kemnal and Still's Contract*, 1923, 1 Ch. 293. It is of course implied in this decision that an executor or an administrator, on whom as such an undivided share in leasehold hereditaments has (at any date) devolved, has the same power to concur in a partition of those hereditaments."

Pages 217, note (*u*), 223, note (*o*).—Add: "The decision in *Re Kemnal and Still's Contract*, 1923, 1 Ch. 293, which authorises an executor or an administrator taking an undivided share of land to concur in a partition, as being a proper step towards the realisation of the assets for the purposes of his office (see above, p. 216, note (*t*), *Addenda*), does not appear to empower an executor or administrator who has discharged the duties of his office, and holds land in severalty in trust for several beneficial devisees or next of kin, to partition that land between them."

Page 252, note (*n*).—Add at end of first line: "*Re Kemnal and Still's Contract,* 1923, 1 Ch. 293, 308, 311, 316, holding that the decision in that case (as to which, see above, p. 216, note (*t*), *Addenda*) does not apply to *trustees* for sale, who are limited in their powers by the instrument which created the trust."

Page 254, note (*i*).—The case of *Re Chaplin's Contract,* 1922, W. N. 260, has now been reported, *nom. Re Chaplin and Staffordshire Potteries Waterworks Co.'s Contract,* 1922, 2 Ch. 824.

Pages 325, line 14, after "possession," 327, note (*h*).—Add a reference to *Re Wright and Thompson's Contract,* 1920, 1 Ch. 191.

Page 341, note (*m*).—Add a reference to *Atkin* v. *Rose,* 1923, 1 Ch. 522, 535-536, and *Fuller's Theatre, &c. Co., Ltd.* v. *Rofe,* 1923, A. C. 435, 443.

Pages 352, note (*c*), 359, notes (*x*), (*b*), 360, note (*h*).—Add a reference to *Rider* v. *Ford,* 1923, 1 Ch. 541, 546, 547, in which case it may respectfully be doubted whether the learned judge was right in holding that the agreement could not be construed as giving an option to purchase the freehold, independent of the agreement for the lease, to the defendant personally. The agreement was contained in an offer by the plaintiffs (duly accepted) that the defendant should take a house for three, five or seven years, and should have the option of purchasing the freehold for 2,000*l.* If an action had been brought for specific performance of this agreement, would it have been right to insert in the deed carrying it out an option for the defendant, *his executors, administrators or assigns* to purchase the freehold of the plaintiffs, *their heirs or assigns?* Options to purchase are strictly construed: see above, p. 509, n. (*t*). And it is submitted that they ought to be so construed when they are valid according to the precise terms thereof, but wholly or partly invalid if extended to the parties' representatives in law and assigns. Or if the agreement was rightly construed as giving an option to the defendant, his executors, administrators or assigns to purchase from the plaintiffs, their heirs or assigns, why was it not severable and therefore enforceable by the defendant personally against the plaintiffs personally (see above, p. 359 and n. (*b*))?

Page 388, notes (*t*), (*y*), (*z*).—Add a reference to *Atkin* v. *Rose,* 1923, 1 Ch. 522, 537-539.

Page 402, notes (*m*), (*o*).—Add a reference to *City of London Land Tax Commrs.* v. *Central London Railway,* 1913, A. C. 364, 379.

Page 391, line 23 and note (*p*).—Stat. 9 & 10 Geo. V. c. 63, is now replaced by sect. 26 of the Agricultural Holdings Act, 1923, stat. 13 & 14 Geo. V. c. 9.

Page 391, note (*s*).—Stat. 9 & 10 Geo. V. c. 63, s. 1, as amended by 10 & 11 Geo. V. c. 76 and 1st Sched., is now replaced by 13 & 14 Geo. V. c. 9, s. 26 (1).

Page 391, note (*t*).—Stat. 10 & 11 Geo. V. c. 76, s. 10, is now replaced by 13 & 14 Geo. V. c. 9, s. 12.

Page 404, note (*g*).—Add: "And as to the evidence required to prove that a piece of water, such as a tidal creek, is part of a public navigable river, see *Sim E. Bak* v. *Ang Yong Huat*, 1923, A. C. 429."

Page 460, note (*g*).—Add at end: "In *Macedo* v. *Beatrice Stroud*, P. C., 1922, 2 A. C. 330, securities were directed to be marshalled according to the value of the properties charged at the time when the equity to apportion the values first arose."

Page 469, note (*y*), *Addenda* (Vol. I. p. xlviii).—The case of *Chambers* v. *Randall*, 1922, W. N. 282, is now reported, 1923, 1 Ch. 149. In that case there was a covenant by a purchaser with the vendor, his heirs, executors and administrators (amongst other things) to observe certain restrictions with respect to the land sold, and not to do or permit on the land sold anything which might be prejudicial to the value of the houses belonging to the vendor in C. Terrace adjacent to the said land. Sargant, J., held that the benefit of this covenant was not intended to be annexed to those houses, and that in these circumstances, after the vendor had parted with all those houses, neither his assigns nor his executors could enforce the restrictive covenants specifically against the purchaser's assigns.

Pages 664-667.—By a resolution of the House of Commons, passed the 3rd July, 1923, the following clause was to stand part of the Finance Bill, 1923:—"As from the commencement of this Act such parts of section 4 of the Finance (1909-10) Act, 1910, as are not repealed by section 57 of the Finance Act, 1920, shall be repealed." And the Bill was read the third time and passed in the House of Commons on the 4th July, 1923. The above clause will therefore be inserted in the Finance Act, 1923. Its effect will be that, as from the date of the commencement of that Act, the obligations to deliver particulars of sales, and of leases or agreements for leases for over fourteen years, of land, and to stamp the instruments effecting them with a Particulars Delivered stamp will be abolished. It must be borne in mind, however, that such instruments executed after the commencement of the Finance Act, 1920 (passed 4th Aug. 1920), and before the commencement of the Finance Act, 1923, are not duly stamped unless they bear the Particulars Delivered stamp.

Page 680, line 4.—After "discrepancy," add a note referring to *Re Courcier and Harrold's Contract*, 1923, 1 Ch. 565.

Page 682, note (*k*).—Add: "The statement in the text, as to the common-form condition with respect to compensation extending to a matter of right as well as of physical content, was approved, and the point was so decided with respect to the common-form

condition *excluding* the right to compensation (see pp. 679, 680), by Sargant, J., in *Re Courcier and Harrold's Contract,* 1923, 1 Ch. 565, 572."

Page 842, note (*q*).—Add: "*Thomas* v. *Brown,* 1 Q. B. D. 714, was followed by Horridge, J., in *Monnickendam* v. *Leanse,* 39 T. L. R. 445."

Page 848, note (*m*).—Add at end: "In *Steinberg* v. *Scala* (*Leeds*), *Ltd.,* C. A., 1923, W. N. 180; 67 Sol. J. 656, it was held that, where an infant has paid away money under a contract of purchase (not for necessaries), under which he has obtained some benefit, so that there has not been an entire failure of consideration, he cannot recover the money so expended; and the decision in *Hamilton* v. *Vaughan Sherrin, &c. Co.,* 1894, 3 Ch. 389, was overruled. It does not appear, however, that this decision of the Court of Appeal precludes an infant from recovering money paid away by him under a contract from which he has derived *no* benefit and as to which there *has* been an entire failure of consideration. It is submitted, therefore, that it does not preclude an infant from recovering money paid away by him, without any valuable consideration, as a voluntary gift if he choose to avoid the gift."

Pages 859, notes (*b*), (*d*), (*f*), 861, notes (*q*), (*r*).—The points discussed in the text, to which these notes are appended, must now be considered in the light of the decision of the Court of Appeal in *Steinberg* v. *Scala* (*Leeds*), *Ltd.,* 1923, W. N. 180; see above, p. 848, n. (*m*), *Addenda.*

Page 877, note (*k*).—The decision in *Re Rush,* 1923, 1 Ch. 56, has been reversed, *nom. Public Trustee* v. *Wolf,* 1923, W. N. 187, and the order of Russell, J., in *Re Rush,* 1922, 1 Ch. 302, restored. The Treaty Charge effectively operates, therefore, on a married woman's estate or interest, notwithstanding that she be restrained from anticipation in respect thereof. As to the effect of the Treaty Charge on property given to infants contingently upon their attaining twenty-one or marrying, see *Re Neuburger's Settlement,* 1923, 1 Ch. 508.

Page 1042, note (*q*).—Add: "For a case of a subsequent ratification by the principal relating back to and confirming an alteration, unauthorised at the time, by an agent in the terms of the memorandum of the contract, see *Koenigsblatt* v. *Sweet,* 1923, W. N. 82, 194."

Page 1042, note (*r*).—Add: "Cf. *Ariadne Steamship Co.* v. *James McKelvie & Co.,* 1922, 1 K. B. 518, affirmed *nom. Universal Steam Navigation Co.* v. *James McKelvie & Co.,* 1923, W. N. 146."

Page 1042, note (*s*).—Add: "*Ariadne Steamship Co.* v. *James McKelvie & Co.,* 1922, 1 K. B. 518, affirmed *nom. Universal Steam Navigation Co.* v. *James McKelvie & Co.,* 1923, W. N. 146."

Page 1045, note (*m*).—The case of *Ariadne S.S. Co.* v. *James McKelvie & Co.*, 1922, 1 K. B. 518, has now been affirmed, *nom. Universal Steam Navigation Co.* v. *James McKelvie & Co.*, 1923, W. N. 146.

Page 1202, note (*c*).—Add: "The above expressions, and even a gift of an annuity "clear of all deductions whatsoever for taxes or otherwise," do not confer on the annuitant the right to have the annuity paid free of income tax. To effect this, there must be an express reference to income tax as such, or a reference to it by necessary implication; see *Re Shrewsbury Estate Acts*, 1923, 1 Ch. 486, 493, 494, 496, 499, 500, and cases there cited."

FURTHER ADDENDA.

Page 1, line 13.—Add a note: "*Rose & Frank Co.* v. *J. R. Crompton & Bros., Ltd.*, 1923, 2 K. B. 261, 282, 288, 289, 293."

Page 10, note (*f*).—*Horner v. Walker* (see *Addenda*, above, p. xxxvii.) is now reported, 1923, 2 Ch. 218.

Page 122, note (*l*), line 4.—Add after "A. C. 64" "*Harper* v. *Hedges*, 1923, 2 K. B. 314, 323, 324, in which case it was presumed by the Court that a deed of exchange executed in 1785, which would not have been valid unless it had been authorised by statute, was so authorised by some private Act of Parliament."

Page 262, note (*m*).—Add: "Eve, J., *Re Harding*, 1923, 1 Ch. 182, 184."

Page 262, line 20.—Add: "unless an intention to that effect be expressed or can be implied in the instrument creating the power; *Re Harding, ubi sup.*"

Page 277, note (*d*).—Add at end: "See *Re Berchtold*, 1923, 1 Ch. 192, treating *Murray* v. *Champernowne*, 1901, 2 Ir. 230, as well decided."

Page 292, note (*i*), line 17.—Add a reference to *A.-G.* v. *Parr*, 1923, 2 K. B. 456.

Page 332, note (*y*), lines 9, 10.—Add after *Nye* v. *Davis*, 1922, 2 K. B. 56: "*King* v. *Millen*, 1922, 2 K. B. 647; *Wood* v. *Carwardine*, 1923, 2 K. B. 185."

Page 332, note (*y*), line 10.—Add after "furniture" a reference to *Wilkes* v. *Goodwin*, 1923, 2 K. B. 86.

Page 334, line 19.—Add a foot-note: "By the Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 Geo. V. c. 32, passed 31st July, 1923), s. 1, subject to the provisions of that Act, the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, is to continue in force until the 24th June, 1925; see above, p. 331 and note (*y*). This Act of 1923 (in sects. 2—11) amends the Act of 1920 in several particulars with respect to its restrictions on the increase of rent and the recovery by the landlord of demised premises, which are dwelling-houses within the meaning of the Act of 1920 (see above, p. 332, note (*y*)). But, beyond extending the time of the continuance of the Act of 1920 as above mentioned, the Act of 1923 makes no alteration in the provisions of the Act of 1920 (sects. 1, 4, 7) with respect to its restrictions on raising the rate of interest under and calling in mortgages, to which the Act of 1920 applies (see above, pp. 331, 332, note (*y*)); except as regards (A) the time within which sums paid by a mortgagor and recoverable under sect. 14 (1) of the Act of 1920 (see above, p. 333, note (*y*)) are to be recoverable, and (B) the events in which the Act of 1920 is to cease to apply to the dwelling-houses subject thereto. As to (A), this time is limited by sect. 8 (2) of the Act of 1923 to within six months from the date of payment, or in the case of a payment made before the passing of the Act of 1923, to six months from the time of the passing of that Act. As to (B), by sect. 2 (1) of the Act of 1923, where the landlord of a dwelling-house, to which the Act of 1920 applies, is in or comes into possession of the whole of the dwelling-house at or at any time after the passing of the Act of 1923, then from and after the passing of that Act, or the date when the landlord subsequently comes into possession, the Act of 1920 is to cease to apply to the dwelling-house: provided that, where part of a dwelling-house to which the Act of 1920 applies is lawfully sub-let, and the part so sub-let is also a dwelling-house to which that Act applies, that Act is not to cease to apply to the part so sub-let by reason of the tenant being in or coming into possession of that part, and if the landlord is in or comes into possession of any part not so sub-let, that Act is to cease to apply to that part, notwithstanding that a sub-tenant continues in or retains possession of any other part by virtue of that Act; provided also that, where a landlord comes into possession under an order or judgment made or given after the passing of the Act of 1923, on the ground of non-payment of rent, the Act of 1920 shall, notwithstanding anything in the foregoing provisions of this sub-section, continue to apply to the dwelling-house. By sect. 1 (2) of the Act of 1923, where at any time after the passing of that Act, the landlord of a dwelling-house, to which the Act of 1920 applies, grants to the tenant a valid lease of the dwelling-house for a term ending at some date after the 24th June, 1926, being a term of not less than two years, or enters into a valid agreement with the tenant for a tenancy for such a term, the Act of 1920 is, as from the commencement of the

term, to cease to apply to the dwelling-house, and nothing in the Act of 1920 is to be taken as preventing or invalidating the payment of any agreed sum as part of the consideration for such lease or agreement: provided that, where part of the dwelling-house is lawfully sub-let at the commencement of the term, and is a dwelling-house to which the Act of 1920 applies, that part is, notwithstanding anything in the foregoing provisions of this sub-section, to continue to be a dwelling-house to which the Act of 1920 applies. And by sect. 3 of the Act of 1923, where before the passing of that Act the landlord of a dwelling-house, to which the Act of 1920 applies, has granted to the tenant a valid lease of the dwelling-house for a term ending at some date after the 24th June, 1923, or has entered into a valid agreement with the tenant for a tenancy for such a term, and the rent thereby reserved is reserved at a rate, which after but not before such last-mentioned date exceeds the standard rent and the increases permitted under the Act of 1920 or the Act of 1923, the landlord may, by three months' notice in writing expiring not earlier than the 31st December, 1923, and not later than the 31st March, 1924, determine the said lease or tenancy: provided that, if within one month of the receipt of such notice the lessee or tenant shall give to the landlord notice in writing that he elects to abide by the said lease or agreement and the terms thereof, then the said lease or agreement shall remain in full force and effect in every respect, including the amount of the rent thereby expressed to be reserved, unaffected by the Act of 1920 or the Act of 1923.

"Part II. of the Act of 1923 imposes certain restrictions after the expiry of the Act of 1923. By sect. 14 (1) thereof, where a dwelling-house in the occupation of a sitting tenant (*i.e.*, the tenant of a dwelling-house, to which the Act of 1920 then applies or applied: see sect. 12 (1)) is subject to a mortgage to which the Act of 1920 applied (see above, pp. 331, 332, note (*y*)), the County Court may, on the application of the landlord, make an order restraining the mortgagee from calling in or taking steps for enforcing his security or for recovering the principal money thereby secured, if it is satisfied that such calling in, enforcement or recovery would cause exceptional hardship to the landlord. The County Court may, on the application of the mortgagee or landlord, rescind or vary any order so made if satisfied that by reason of any material change in circumstances, rescission or variation is necessary or proper. By sect. 14 (2), the restrictions imposed on a mortgagee by an order under this section may be imposed subject to such conditions as regards increase of interest or otherwise and for such time as appears to the Court to be proper, but so nevertheless that the restrictions shall cease to be operative if at any time after the making of the order—(a) interest is more than twenty-one days in arrear, or (b) any covenant by the mortgagor (other than the covenant for the repayment of the principal money secured) is broken or not performed, or (c) the mortgagor fails to

keep the property in a proper state of repair or to pay the interest or instalments of principal recoverable under any prior encumbrance, or (d) the sitting tenant ceases to be the tenant of the dwelling-house. By sect. 14 (3), this section is not to apply to a mortgage where the principal money secured thereby is repayable by means of periodical instalments extending over a term of not less than ten years from the creation of the mortgage. By sect. 17, Part II. of the Act of 1923 is to continue in force until the 24th June, 1930: but if a resolution is passed by both Houses of Parliament for the repeal of that Part of that Act at some earlier date, the King in Council may repeal that part of that Act on such date as may be specified in that behalf in the resolution."

Page 350, note (*s*).—Add: "See *United Dairies, Ltd.* v. *Public Trustee,* 1923, 1 K. B. 469, where one of several tenants in common, assignees of a lessee, was held liable to pay to the lessor the full amount of the damages recoverable under a covenant to repair contained in the lease."

Page 380, notes (*m*), (*n*).—Add a reference to *Baker* v. *Inland Revenue Commrs.*, 1923, 1 K. B. 323.

Page 441, note (*c*).—Add at end: "*Re Shakespeare Memorial Trust,* 1923, W. N. 237."

Page 496, note (*d*).—Add: "See *Adams* v. *Morgan & Co.*, 1923, 2 K. B. 234, as to the right of a vendor so carrying on business to be indemnified in respect of all payments properly made by him."

Page 604, note (*h*).—Add: "*Hansford* v. *Jago,* 1921, 1 Ch. 322, 335 *sq.;* and as to the implication of easements on contemporaneous leases of several tenements, see *Cory* v. *Davies,* 1923, 2 Ch. 95; and cf. *Long* v. *Gowlett,* 1923, 2 Ch. 177."

Pages 664—667 (see *Addenda,* above, p. xl.).—The above-mentioned clause of the Finance Bill, 1923, is now enacted as law in the Finance Act, 1923 (stat. 13 & 14 Geo. V. c. 14, passed 18th July, 1923), s. 38. The former obligations to deliver particulars and stamp with the Particulars Delivered Stamp ceased as from that date.

Pages 770, 771.—The statement here made (p. 783, 2nd ed.) of the law was referred to with approval by Warrington, L.J., in *Craddock Bros.* v. *Hunt,* 1923, 2 Ch. 136, 160.

Page 777, note (*c*).—The opinion expressed on pp. 788—791 of the 2nd edition of this book was referred to by Lord Sterndale, M.R., in *Craddock Bros.* v. *Hunt,* 1923, 2 Ch. 136, 151.

Page 777, note (*e*).—*Craddock Bros.* v. *Hunt* is now reported, 1923, 2 Ch. 136.

Page 822, note (*c*).—Add a reference to *Westen* v. *Fairbridge,* 1923, 1 K. B. 667, 672.

Page 832, note (*e*).—*Brooks, Bidlake & Whittal, Ltd.* v. *A.-G. for British Columbia* is now reported, 1923, A. C. 450, 458.

Pages 840, 841, note (*y*).—Add after "*Seymour* v. *Pickett, ib.* 715" "*Holt* v. *Markham,* 1923, 1 K. B. 504 (decided on the ground of estoppel)."

Page 978, note (*r*).—Add: "It should be noted that § 1039 of Fry, Sp. Perf., was cited with approval by Lord Dunedin in *Morris* v. *Baron & Co.,* 1918, A. C. 1, 28, and that case may now be cited in support of the proposition stated in § 1039. In that case it was held in the House of Lords that, if the new agreement show a definite intention to abandon the old contract, so that the abandonment of the old contract is one of the terms of the new agreement, it may be put in evidence to prove such intention, although as regards carrying out its other terms, it be unenforceable for want of a signed writing. But, as Sir Edward Fry said in § 1039, 'In point of principle such a new agreement seems to stand on the same footing as a simple agreement to rescind.' That is to say, it is in effect an *express* waiver of the old contract. This point is dealt with in lines 13—17 of p. 979 of this book.

"In the recent case of *Rose & Frank Co.* v. *J. R. Crompton & Bros., Ltd.,* 1923, 2 K. B. 261, it was argued (pp. 278, 279) that an agreement, which is not a contract binding the parties thereto at law, may yet operate to rescind an existing contract. This point was not decided by the Court, but Lord Justice Scrutton expressed the opinion (p. 290) that this argument was well founded. In that case, however, the new agreement, as a whole, was held to be, not merely unenforceable, but altogether void at law. It is respectfully submitted that this is a different point from that decided in *Morris* v. *Baron,* in which case the new agreement was not void, but merely unenforceable, as regards the sale thereby contemplated, for want of compliance with sect. 4 of the Sale of Goods Act, 1893; and that where (as in *Rose & Frank Co.* v. *J. R. Crompton & Bros., Ltd.*) the new agreement is expressly declared to be merely an honourable understanding, not cognizable by the law courts, and does not purport to be a contract at all, it cannot be put in evidence to prove an express abandonment of the old contract. If it could, how could it any longer be a mere understanding and no contract?"

Page 979, note (*x*).—See *Addenda* to p. 978, note (*r*).

Page 986, note (*y*).—Add: "*Cardiff Corpn.* v. *Cook,* 1923, 2 Ch. 115, 121 *sq.*"

Page 1219, note (*x*).—Add after "*A.-G.* v. *Worrall*" "*A.-G.* v. *Sandwich,* 1922, 2 K. B. 500."

Page 1225, note (*b*).—Add after "*A.-G.* v. *Boden*" "*A.-G.* v. *Sandwich,* 1922, 2 K. B. 500."

Page 1233, note (*d*).—Add: "*Re Abergavenny,* 1923, 2 K. B. 18."

POSTSCRIPT.

ATTENTION is especially directed to the *Addenda* and Further *Addenda*, which bring both the first and the present volume down to the date given below. It will be seen that several very important cases have been decided or reported, and statutes passed, since the first volume was published and the text of the present volume was printed off, and even since the first *Addenda* were in print. The *Addenda* and Further *Addenda* contain criticisms of Mr. Justice Russell's decision on one point in *Rider* v. *Lord*, 1923, 1 Ch. 541, and Lord Justice Scrutton's *dicta* in *Rose & Frank Co.* v. *J. R. Crompton & Bros., Ltd.*, 1923, 1 K. B. 261; also a statement of the relevant provisions of the Finance Act, 1923, and the Rent and Mortgage Interest Restrictions Act, 1923.

7, STONE BUILDINGS, LINCOLN'S INN.
13th September, 1923.

THE LAW

RELATING TO

VENDOR AND PURCHASER OF LANDS.

CHAPTER XIII.

OF MISTAKE.

§ 1. Of mistake as precluding true consent.
§ 2. Of mistake in the expression of consent, and its rectification.

In the previous part of this book the normal course of a contract for the sale of land has been traced from its formation down to its completion. We will now treat of the avoidance of the contract. This may take place either because the consent of a party thereto is in some way impeachable, as on the ground of mistake, fraud, misrepresentation, duress or undue influence; or because the contract is tainted with illegality; or because the parties or one of them are or is not of full capacity to buy or sell land (*a*). We will consider these grounds of avoiding the contract in the order in which they are named. And first, of Mistake.

§ 1.—*Of mistake as precluding true consent.*

We have seen (*b*) that, in order to make a valid contract, it is necessary that there should be true, full and free consent of the parties; that is, consent unimpeachable as having been

(*a*) Above, pp. 1, 2.

(*b*) Above, p. 2.

induced by mistake, misrepresentation, fraud, duress or undue influence. In dealing with mistake, as the cause of the want of consent, let us first eliminate the case where the parties are really agreed but there is an error in the expression of their consent. In that case the error may generally be rectified. And we will discuss the subject of mistake as a ground for the rectification of the agreement, after we have considered it as giving rise to a claim for obtaining the avoidance or resisting the specific performance of the contract.

Where the contract is impeachable for mistake, misrepresentation, fraud, &c., there is always an *apparent* consent.

No real assent in the case of mistake.

Now in all cases where the validity of a contract is impeachable on the ground of mistake, misrepresentation, fraud, duress or undue influence, there is an apparent consent of the parties. At first sight, their minds are met. But the case of mistake appears to differ from the other grounds above mentioned for setting aside the contract in this, that where there is mistake there never has been an intention common to both parties—the one has never given any real assent to what has been proposed by the other. Apparently, the one did an act which amounted in the law to contract: but his mind did not accompany his overt act; he never intended to do what, to all outward appearance, he did. But in the case of misrepresentation, fraud, duress or undue influence, a consent, which is to a certain extent a true consent, accompanies the act, which is outwardly manifested. The party misled by misrepresentation or fraud, or coerced or influenced, really means to agree with the other in the terms expressed; he truly intends to contract: only he would not have been willing to do so, if he had known the truth with regard to the fact, as to which he was misled by the other, either innocently or fraudulently, or if he had not been forced or influenced (*c*). The consequence of this distinction is very marked. Contracts induced by any mistake, which the mistaken party is not estopped from asserting, are altogether void from the beginning; there never has been from the outset any agreement between the parties (*d*). But contracts induced by misrepresentation, fraud, &c., are voidable only (*e*). This contrast is perhaps best illustrated in the case of negotiable instruments. A bill of exchange or promissory note, which

In the case of misrepresentation, fraud, &c., there is real consent induced by belief in non-existent facts or by coercive influence.

Averrable mistake makes the contract void from the beginning.

Contracts induced by misrepresentation, fraud, &c., are voidable only.

(*c*) See *Whitehorn* v. *Davison*, 1911, 1 K. B. 463, 479, 486.

(*d*) See *Carlisle and Cumberland Banking Co.* v. *Bragg*, 1911, 1 K. B. 489.

(*e*) See *Whitehorn* v. *Davison*, 1911, 1 K. B. 463.

was given or made by some averrable mistake, excluding true consent, is void, and is therefore of no more avail in the hands of a holder in due course than a forged bill or note (*f*). But a bill or note procured to be made by fraud, though voidable by the giver or maker as against the party who misled him, is valid in the hands of a holder in due course, against whom the plea of fraud cannot prevail (*g*).

The rule is that, where owing to mistake the parties' minds are not at one, there is no contract.

Unilateral mistake.

With regard to mistake as a ground for avoiding a contract altogether, the rule of the common law appears to be that, in order to make a valid contract, there must be true consent of the parties; so that, where owing to a mistake the parties' minds are not at one, the contract is void; that is to say, there is no agreement at all (*h*). And it seems that this rule may in some cases hold good, notwithstanding that the mistake be that of one party only, the other truly intending to contract in the terms expressed (*i*). The rule is, however, subject to the quali-

(*f*) *Foster* v. *Mackinnon*, L. R. 4 C. P. 704; *Lewis* v. *Clay*, 67 L. J. Q. B. 224. As to forged instruments, see next Chapter, § 1, at end.

(*g*) Stat. 45 & 46 Vict. c. 61, ss. 29, 30, 38; *Tatam* v. *Haslar*, 23 Q. B. D. 345; *Clutton* v. *Attenborough*, 1895, 2 Q. B. 306, 707; 1897, A. C. 90.

(*h*) *Smith* v. *Hughes*, L. R. 6 Q. B. 597, 607, 609; Benjamin on Sale, 42, 2nd ed.; *Carlisle and Cumberland Banking Co.* v. *Bragg*, infra, 1911, 1 K. B. 489, 497. The same rule appears to hold good as regards the conveyance of any property; if there be no true assent of the parties in parting with and accepting the thing assured, the conveyance is void. But as regards the conveyance of lands or goods, this rule is subject to the qualification that the assent of the alienee is presumed until the contrary be shown, and in the meantime (if the conveyance were duly made in accordance with the forms prescribed by law) the alienor is estopped from disputing the assurance. Thus if one disclaim a conveyance of lands or goods made to him, the conveyance is thenceforth void as from the time of its execution: but until disclaimer the estate or property passes to the alienee. See Bract. fo. 15 b, 16; Y. B. 7 Edw. IV. 20 (pl. 21), 29 (pl. 14); Litt. ss. 684, 685; *Thoroughgood's case*, 2 Rep. 9; *Butler and Baker's case*, 3 Rep. 25a, 26b; Shep. Touch. 229, 267, 285; *Thompson* v. *Leach*, 2 Vent. 198, 202, 208; 2 Prest. Abst. 226-228; *Siggers* v. *Evans*, 5 E. & B. 367, 380 *sq.*; *Peacock* v. *Eastland*, L. R. 10 Eq. 17; *Expte. Cote*, L. R. 9 Ch. 27, 32; *Standing* v. *Bowring*, 31 Ch. D. 282; *Mallott* v. *Wilson*, 1903, 2 Ch. 494; *Edmunds* v. *Edmunds*, 1904, P. 362, 374; *Howatson* v. *Webb*, 1907, 1 Ch. 537, 543-548, affirmed, 1908, 1 Ch. 1; *Bagot* v. *Chapman*, 1907, 2 Ch. 222; *Carlisle and Cumberland Banking Co.* v. *Bragg*, 1911, 1 K. B. 489, 497. Cf. *Scriven* v. *Hindley*, 1913, 3 K. B. 564, 569, decided on the ground that the vendor caused or contributed to cause the mistake.

(*i*) See *Thoroughgood's case*, 2 Rep. 9; *Carlisle and Cumberland Banking Co.* v. *Bragg*, 1911, 1 K. B. 489; below, pp. 745-747.

If one *manifest* a certain intention, he is estopped from proving that his real intention was different.

fication, that "whatever be a man's real intention, if he *manifests* an intention to another party, so as to induce the latter to act upon it in making a contract, he will be estopped from denying that the intention as manifested was his real intention" (*k*). In other words, the rule requiring true consent of the parties to a contract is modified by the operation of the general rule of law that every man is taken to intend the natural and reasonable consequences of his own overt acts, including his spoken or written words; he is estopped from showing that what he really intended was something different from what a man of ordinary intelligence would naturally and reasonably infer from those acts or words (*l*). And this qualification is of enormous importance; indeed in practice the qualification overshadows the rule. For the instances, in which a person truly mistaken is estopped from proving his real intention, are so much more common than those in which there is no such estoppel, that when we come upon a case where a man's real intention may be set up to defeat an apparent expression of his consent, we are apt to regard it as exceptional (*m*).

(*k*) Benjamin on Sale, 45, 2nd ed.

(*l*) *Freeman* v. *Cooke*, 2 Ex. 654, 663; *Cornish* v. *Abington*, 4 H. & N. 549, 555, 556; *Smith* v. *Hughes*, L. R. 6 Q. B. 597, 607, 609; *Smith* v. *Chadwick*, 9 App. Cas. 187, 190; *Little* v. *Spreadbury*, 1910, 2 K. B. 658, 664, 665; *Eastes* v. *Russ*, 1914, 1 Ch. 468, 474, 480; and consider *Dewar* v. *Mintoft*, 1912, 2 K. B. 373, 375, 380, 383, where one who bid at an auction intending merely to start the sale, was held to be bound by the contract so made.

(*m*) The writer is aware that it is contended by eminent jurists that the law has no concern at all with the real intentions of the parties to a contract, but can only regard the intention which they have outwardly manifested; O. W. Holmes, The Common Law, 309; Holland, Jurisprudence, 246-252, 9th ed. It is nevertheless submitted that the common law of England is as stated in the text, and recognises, as a rule of pure law (so pure that it rarely emerges from the region of abstract theory into concrete shape), that the true consent of the parties is necessary to make a valid contract. This precept of perfection is almost always obscured by the operation of the qualifying law of estoppel by outward manifestation of consent. But it is contended that the principle, that true consent is necessary to make a contract, is exhibited in the case where the terms of a written contract contain a latent ambiguity with regard to the subject-matter thereof. Thus in the well-known case of *Raffles* v. *Wichelhaus*, 2 H. & C. 906, where the plaintiff sued for breach of a contract for the sale of goods "to arrive ex Peerless," it was pleaded that the defendant meant a ship so called which sailed from Bombay in October, but the plaintiff had not offered any goods arriving by this ship in fulfilment of the contract, and had only offered goods arriving by another ship of the same name; and this was held upon the plaintiff's demurrer to be a good plea. This decision shows that where there is no true consent, there is no contract. But if the plea had

Raffles v. *Wichelhaus*.

Subject to this qualification then the rule is that contracts purporting to be made by spoken or written words apparently been set up fraudulently, it would have been competent to the plaintiff to join issue thereon and to give evidence that the defendant really meant the same ship as the plaintiff; see cases cited, below, pp. 751, n. (*z*), 769, n. (*g*); *Smith* v. *Thompson*, 8 C. B. 44, 59, 60; *Bruff* v. *Conybeare*, 13 C. B. N. S. 263, 274, 275. It thus appears that ultimately the law does regard the parties' real intention. If this were not so, and the law were *never* concerned with anything but what the parties have *said*, every contract expressed in terms similar to that in *Raffles* v. *Wichelhaus* would be void for uncertainty so soon as it appeared that the description could be applied to more than one object, and no further evidence would be admissible. But that is not the law; see *Re Hubbuck*, 1905, P. 129, 132-134. If I have two estates called Blackacre, one in Hampshire and the other in Northumberland, and I contract with J. S., who knows nothing of my estate in Northumberland, but whom I have shown over my estate in Hampshire as an intending purchaser, to sell to him "my estate called Blackacre," this contract is not rendered void for uncertainty on my proving that I have another Blackacre in Northumberland, but J. S. is at liberty to give oral evidence that I took him over Blackacre in Hampshire and offered to sell that property to him, and so to prove that that property is what was really referred to or meant by both parties in the written memorandum under the description of "my estate called Blackacre." It must be admitted, however, that there is authority for the theory that, in such cases, the question is not what did the parties intend, but is, what is the signification of the words they have used; Parke, J., *Richardson* v. *Watson*, 4 B. & Ad. 787, 800; and see L. Q. R. xx. 245. This view is upheld by Mr. Justice O. W. Holmes, The Common Law, p. 309, where he maintains that the true ground of the decision in *Raffles* v. *Wichelhaus* was, not that each party *meant*, but that each *said* a different thing; see also Harvard Law Review, xii. 417. But considering that each party, in so far as he *said* anything at all, used the very same words, it could only be established that they said a different thing by showing that the word used signified to the mind of the plaintiff one ship and to the mind of the defendant another, or held out to the defendant's mind one meaning and to the plaintiff's another. The difference between proving what was in the parties' minds as to the signification of the word used, and proving what was their intention, seems to be very fine. And upon either view of the matter, the plaintiff was at liberty to prove, if he could, *that the parties minds were at one* as regards the meaning of the word *Peerless*. It seems therefore that the law *does* sometimes take account of what passes in men's minds, and does in this instance require that the parties' minds shall be at one. And it is submitted that, if the outward manifestation were alone to be regarded, there could be but one conclusion in all such cases, namely, that the parties have said what is ambiguous and therefore void for uncertainty. Again, where A. is induced by the fraud of B. to sign a contract for the sale of his land to C. in the belief that he is signing an agreement for a lease, A. would surely be bound, if the outward manifestation of his intention could alone be considered. But he is at liberty to prove that his intention did not accompany his apparent act, and is not bound, unless he be estopped by his negligence; see below. pp. 745-747. It may perhaps be more readily maintained in this case that A. is not bound because he and C. have not really said the same thing, have not in truth joined in the expression of consent; see

Mistake on some point going to the whole subject of the contract.

expressing a true consent are void if there be no real agreement of the parties' minds in some point which goes to the whole substance of the contract (*n*). Thus on an apparent agreement for the sale of land, if the parties' minds be not at one, owing to an averrable mistake made on either side with regard to the nature of the transaction, the personality of the other contractor or the property to be sold, there is no contract between

O. W. Holmes, The Common Law, 308, 309. But it may be replied that to all outward appearance A. and C. *have* said the same thing, for A. has himself affixed his own signature to the document: but A. did not mean to do so; and in the particular circumstances he is not precluded from giving evidence as to the state of his own mind at the time when he signed the writing. It is further submitted that, upon a general view of the law of England, taking in the rules of equity as well as of common law, we can hardly fail to recognise the principle, that there ought to be true consent to make a contract. It was on this principle that Courts of Equity would refuse to enforce specific performance of a contract wanting in the element of true consent, though valid, on the ground of manifested consent, at law. Not until the year 1880 was it decided that the law of estoppel through manifestation of consent *may* prevail over this principle in the matter of enforcing specific performance of the contract as it may in determining the validity of the agreement at law; *Tamplin* v. *James*, 15 Ch. D. 215. And though the rule requiring true consent is now so qualified, it is nevertheless still open to Courts of Equity to give effect to it by refusing specific performance where there is a want of true consent and it would work great hardship on the mistaken party to apply the law of estoppel. See below, pp. 763-765 and n. (*d*), and above, p. 677. The case of *Re Meyer*, 1908, P. 353, appears to support the author's position. In that case a lady executed by mistake a document intended to be signed by her sister as a codicil to the sister's will; and it was held that the document was void for want of any true intention to execute it. Consider also *Hood* v. *McKinnon*, 1909, 1 Ch. 476, where a deed exercising voluntarily and without agreement with any other person a power of appointment was set aside at the appointor's instance on proof that she had executed it in forgetfulness of a prior appointment in favour of the same appointee and so under a mistake of fact; see, too, *Re Walton's Settlement*, 1922, 2 Ch. 509; below, § 2 of this Chapter. These cases prove that, as regards any purely unilateral act affecting a man's legal position or relations and purported to be evidenced by some document, the rule is that execution of the document must be accompanied with true intention to do the act evidenced. But if this be the law, it follows that the validity of a contract made by the unilateral mistake of one party only must depend, where the mistake is not averrable, on the principle of his not being allowed to depart from the consent or intention manifested or held out to the other party, that is, on the principle of estoppel. And see *Carlisle and Cumberland Banking Co.* v. *Bragg*, 1911, 1 K. B. 489, 497; *Scriven* v. *Hindley*, 1913, 3 K. B. 564, 568, decided on the ground that the vendor caused or contributed to cause the mistake.

Mistake in executing document embodying unilateral act in law.

(*n*) *Kennedy* v. *Panama, &c. Mail Co.*, L. R. 2 Q. B. 580, 588; *Howatson* v. *Webb*, 1907, 1 Ch. 537, 543-549, affirmed, 1908, 1 Ch. 1; *Bagot* v. *Chapman*, 1907, 2 Ch. 222; *Carlisle and Cumberland Banking Co.* v. *Bragg*, 1911, 1 K. B. 489; cf. *Scriven* v. *Hindley*, 1913, 3 K. B. 564, decided on the ground that the vendor caused or contributed to cause the mistake; above, p. 741.

them. But if the party mistaken have expressed himself in words which are free from ambiguity and are apt to constitute a valid contract if taken in the meaning which they would naturally convey to a man of ordinary intelligence, then he is estopped from showing that his mental intention was not in accordance with his overt act (*o*). To give examples, first, as to mistake in the nature of the transaction. If one sign a contract for the sale of land under the impression that he is executing an instrument giving effect to some transaction of an entirely different character, for instance, a mortgage, a lease or a power of attorney, the contract may be void, because the man's intention did not accompany his act (*p*). It seems impossible to put a concrete case of this kind in which the mistake has not been caused by the fraud of the other party to the alleged agreement, or by the fraud, negligence or unauthorised interference of a third person, and yet the party mistaken is not estopped from proving his mistake; for if a man of sound understanding sign what he knows to be a legal document capable of affecting his legal relation to some other person, present to his mind as a proposed contractor or grantee, without reading it or having it read to him, he is bound by its contents (*q*); and, as we shall see, the party mistaken *may* be estopped by reason of his negligence where a third person

Estoppel by manifestation of a particular intention.

Mistake in the nature of the transaction.

(*o*) Above, p. 742.

(*p*) *Thoroughgood's case,* 2 Rep. 9; *Simons* v. *Great Western Ry. Co.,* 2 C. B. N. S. 620; *Foster* v. *Mackinnon,* L. R. 4 C. P. 704; *Lewis* v. *Clay,* 67 L. J. Q. B. 224; *Howatson* v. *Webb,* 1907, 1 Ch. 537, 543-549, affirmed, 1908, 1 Ch. 1; *Bagot* v. *Chapman,* 1907, 2 Ch. 222; *Carlisle and Cumberland Banking Co.* v. *Bragg,* ubi sup. The law is the same as regards the execution under a mistake of a deed of conveyance or any other deed; *Thoroughgood's case,* ubi sup.; *Pigot's case,* 11 Rep. 26b, 27b; see below, pp. 747, 748.

(*q*) *Thoroughgood's case,* 2 Rep. 9 a, b; *Maunxel's case,* Moore (K. B.), 182, 184; Shep. Touch. 56; *Anon.,* Skin. 159, pl. 6; *Albemarle* v. *Bath,* Freem. Ch. 193, 194; *S.C.* nom. *Bath* v. *Mountague,* 3 Ch. Ca. 55, 56, 59, 75, 76; *R.* v. *Longnor,* 4 B. & Ad. 647; Mellish, L. J., *Parker* v. *South Eastern Ry. Co.,* 2 C. P. D. 416, 421; Mellish, L. J., *Hunter* v. *Walters,* L. R. 7 Ch. 75, 87; *Tamplin* v. *James,* 15 Ch. D. 215; Farwell, L. J., *Howatson* v. *Webb,* 1908, 1 Ch. 1, 3, 4; *Chaplin & Co., Ltd.* v. *Brammall,* 1908, 1 K. B. 233, 234, 235; *Alliance Credit Bank of London* v. *Owen,* Times Newspaper, 27th May, 1908; *The Luna,* 1920, P. 22, 28. But cf. *Carlisle and Cumberland Banking Co.* v. *Bragg,* 1911, 1 K. B. 489, where it was held that a man who had been entrapped into signing, without reading, a guarantee of a friend's banking account by the friend's fraudulent representation that it was a paper relating to some insurance matter was not estopped by his negligence from proving his mistake against the banking company, to whom it was considered that he owed no duty of care.

wrongfully misled him. But the rule is clearly established where the mistake was made in consequence of the other party's or by a third person's fraud. Thus if a blind or an illiterate man, or even a man free from any physical defect and of ordinary understanding, be induced by the fraud of some person minded to entrap him into a contract, or by the fraud of his own solicitor or servant or some stranger (without any negligence or carelessness on his own part), to sign a contract for sale of his land under the impression that he is executing some document of an entirely different nature, the document is altogether void. It is not his act, for he never intended to utter such a document, and the case is exactly the same as if his signature had been forged (*r*). Or it may be likened to the case where a man, who has received an offer of sale or purchase of land, writes a letter of acceptance, but, being in doubt whether he will send it, places the letter in a drawer to remain there until he shall reconsider the matter (*s*), and a third party without the writer's authority takes the letter from the drawer and sends it to the person who made the offer; in which case it is submitted that no contract is concluded between the parties (*t*). In these instances there is no reason why the party mistaken should be estopped from proving that his intention did not accompany his apparent act; he has not held himself

Letter of acceptance sent without the writer's authority.

(*r*) See previous note. As to forgery, see next Chapter, § 1, at end. The passage in the text is fully confirmed by the case of *Carlisle and Cumberland Banking Co.*, ubi sup.

(*s*) See above, p. 15.

(*t*) See *Phillips* v. *Edwards*, 33 Beav. 440, 445; *Henkel* v. *Pape*, L. R. 6 Ex. 7; *Baxendale* v. *Bennett*, 3 Q. B. D. 525; *Clutton* v. *Attenborough*, 1897, A. C. 90, 96. The offer appears to be ostensibly accepted through the agency of a third person acting without the authority of the party purported to be bound; and the writer of the letter is, it is submitted, no more bound than he would be if the third person had, without his authority, written a letter of acceptance in his name; see *Hollins* v. *Fowler*, L. R. 7 H. L. 757. So where a deed or a similar legal instrument is executed as an escrow, and entrusted to a solicitor to keep until performance of the required condition, and he fraudulently delivers the same without exacting performance of the condition, the person who executed the deed is not estopped from showing that it was not his act; *Lloyd's Bank, Ltd.* v. *Bullock*, 1896, 2 Ch. 192, 194. It may be noted that where one has signed, but not issued, a negotiable instrument complete and valid on the face of it, and the same is taken out of his possession against his will, and put into circulation, it appears that, as against a holder in due course, he cannot avoid his liability on the ground that, owing to the want of any consent between himself and the other party to the instrument, there was no contract at all between them; see *Clutton* v. *Attenborough*, 1897, A. C. 90, 93, 96; and cf. *Smith* v. *Prosser*, 1907, 2 K. B. 735.

out as expressing a contractual intention, nor has he been guilty of negligence (*u*). And it will be observed that in the cases where the mistake was caused, not by the other contractor's fraud but by the wrongful or improper intervention of a third person, the party mistaken is at liberty to prove that his intention did not accompany his outward act, notwithstanding that the mistake was on his side only, the other party truly intending to contract as expressed in the apparent agreement (*x*). But where a man makes a mistake of this kind solely by his own inadvertence, he will in general be precluded from alleging it. Thus we have seen that, where a man executes a document, which he knows to be a contract or conveyance in favour of some particular person, without reading it, he cannot avoid it; and it is submitted that if one in absence of mind sign and send a letter accepting an offer of sale or purchase, in the belief that he is accepting an invitation to dinner, he is bound (*y*). So also it is contended that, where a man, who has written a letter accepting an offer, but intends not to send it until he has reconsidered the matter, by his own inadvertence posts the letter or gives it to another to post, he would be estopped, after the letter had been posted (*z*), from showing that he did not intend to contract as expressed in the letter (*a*). Similarly, when a man knows that he is executing at his solicitor's instance a document which will have some legal consequence—which will be an act on his part affecting his legal position or relations—but he does not ask what will be its exact effect, and has such confidence in his solicitor that he is content to execute it in ignorance, then the document is not *void;* though it may be *voidable* for fraud, if his solicitor fraudulently misled him (*b*). And in this case the

Unilateral mistake.

Estoppel arising from a man's own carelessness.

Executing, without inquiry, a document presented by one's solicitor.

(*u*) See previous note.

(*x*) See *Carlisle and Cumberland Banking Co.* v. *Bragg,* 1911, 1 K. B. 489.

(*y*) See above, p. 745, n. (*q*).

(*z*) Above, p. 15.

(*a*) See H. T. Chitty, *arguendo, Henkel* v. *Pape,* L. R. 6 Ex. 7, 8; Anson on Contract, 159, 160, 8th ed. It is submitted that the remark of Collins, M. R., in *Van Praagh* v. *Everidge,* 1903, 1 Ch. 434, 436, that it was not clear to him, whether the parties were *ad idem,* must not be taken in a sense adverse to the above conclusion. In that case the parties' minds were most certainly not *in truth* at one: but the question whether the defendant was not estopped at law from proving the truth was not argued or decided in the Court of Appeal.

(*b*) See Mellish, L. J., *Hunter* v. *Walters,* L. R. 7 Ch. 75, 88; *King* v. *Smith,* 1900, 2 Ch. 425, 430; *Howatson* v. *Webb,* 1907, 1 Ch. 537, 1908, 1 Ch. 1; Vaughan Williams, L. J., *Lloyd* v. *Grace, Smith & Co.,* 1911, 2 K. B. 489, 501; confirmed in effect in D. P., *S.C.,* 1912, A. C. 716; above, p. 697.

validity of the document, where it binds the party to some transaction into which he did not intend to enter, appears to depend on estoppel; the man's intention did not really accompany his act, but he is precluded by his own negligence from setting-up this objection. So also, if a man execute a document intended to carry out some legal transaction, of the general nature of which he is well aware, such as the sale of his land, he cannot be heard to say that he did not understand the legal effect of the words used, or that he did not mean to enter into the legal obligations or do the legal acts, which according to the proper legal construction of those words are thereby expressed to be undertaken or done (*c*).

Misunderstanding as to effect of a legal document.

Difference between transactions void and voidable.

As we have seen (*d*), the case, where a man executes a legal instrument by mistake under the impression that he is entering into some transaction entirely different from that evidenced by the instrument, must be carefully distinguished from that where he is induced to make a contract or conveyance by a fraudulent misrepresentation as to some fact, other than the nature of the transaction contemplated. In the one case, if the man is not estopped from proving that his intention did not accompany his overt act, the instrument is void (*e*). In the other, he did really intend, at the time of executing the document, to make the contract or conveyance therein expressed: but he would not have had this intention if he had known the truth as to the fact misrepresented (*f*). The document is therefore voidable by him, but it is not altogether void from the outset (*f*).

Conveyance induced by misrepresentation, fraud, &c. not voidable as against a purchaser for value without notice.

Attached to this distinction is the very important consequence, as regards the *conveyance* induced by such fraudulent misrepresentation of lands or goods, that if the person who has taken under such a conveyance dispose of the lands or goods to a purchaser for value (*g*) taking in good faith without notice of the fraud, the conveyance procured by fraud is not voidable as

(*c*) *Powell* v. *Smith*, L. R. 14 Eq. 85; *Tamplin* v. *James*, 15 Ch. D. 215; *Stewart* v. *Kennedy*, 15 App. Cas. 108; *Howatson* v. *Webb*, ubi sup.; *Eastes* v. *Russ*, 1914, 1 Ch. 468, 474, 480.

(*d*) Above, p. 740.

(*e*) Above, pp. 740-745.

(*f*) Above, p. 740; *Hunter* v. *Walters*, L. R. 7 Ch. 75, 82; *Onward Building Society* v. *Smithson*, 1893, 1 Ch. 1, 15; *Lloyd's Bank, Ltd.* v. *Bullock*, 1896, 2 Ch. 192, 196, 197; *Whitehorn* v. *Davison*, 1911, 1 K. B. 463.

(*g*) That is, a purchaser for valuable consideration actually paid or executed; *Hardingham* v. *Nicholls*, 3 Atk. 304; Sug. V. & P. 789; above, pp. 535, 536, and n. (*b*).

against the purchaser (*h*). This doctrine, however, relates only to *conveyances* procured by fraud. *Contracts* induced by fraud may, as a rule, be avoided, notwithstanding that the benefits thereof have been assigned to one taking in good faith and for value without notice of the fraud; for the assignee of the benefit of a contract takes subject to all equities existing between his assignor and the other contractor (*i*). To this rule, negotiable instruments are an exception (*k*). But it should be noted, especially in connexion with contracts for the sale of land, that the rule is only applicable so long as the thing assigned is the benefit of an obligation arising from contract, that is to say, a thing in action. We have seen that where a contract for the sale of land is executed by payment of the purchase money, the purchaser becomes absolutely and entirely entitled in equity to the land, the vendor being thenceforward a bare trustee for him, and having no longer any lien on the land (*l*). In this state of things the vendor is regarded in equity as having made a complete conveyance of the land, and not as remaining under contract to convey it; the parties' agreement has in equity passed out of the stage of executory into that of executed contract. It appears therefore that if a contract so executed were induced by the purchaser's fraud, and he resold or mortgaged the land to a purchaser taking for valuable consideration paid or executed (*m*),

Contracts induced by fraud remain voidable, as against the other contractor's assigns.

Where a sale of land is executed by payment of the purchase money.

(*h*) In this respect the rules of law and equity are the same; so that the conveyance procured by fraud of an equitable estate or interest in lands or goods is not voidable as against a *bonâ fide* purchaser for value without notice of the fraud; and the conveyance so procured of a legal estate or interest cannot be avoided as against such a purchaser taking an equitable interest only; *Sturge* v. *Starr*, 2 My. & K. 195; *Phillips* v. *Phillips*, 4 De G., F. & J. 208, 219; *Hunter* v. *Walters*, L. R. 7 Ch. 75; Lindley, L. J., *National Provincial Bank of England* v. *Jackson*, 33 Ch. D. 1, 13; *Lloyd's Bank, Ltd.* v. *Bullock*, 1896, 2 Ch. 192, 197; cf. *Cave* v. *Cave*, 15 Ch. D. 639, 647. As to the common law rule, see *White* v. *Garden*, 10 C. B. 919; *Kingsford* v. *Merry*, 25 L. J. N. S. Ex. 166, reversed on another ground, 26 L. J. N. S. Ex. 83; *Pease* v. *Gloahec*, L. R. 1 P. C. 219, 229, 230; *Cundy* v. *Lindsay*, 3 App. Cas. 459, 464; *Vilmont* v. *Bentley*, 18 Q. B. D. 322, 330; 12 App. Cas. 471, 473, 483 (this decision gave rise to the amending stat. 56 & 57 Vict. c. 71, s. 24 (2)); stat. 56 & 57 Vict. c. 71, s. 23; *Whitehorn* v. *Davison*, 1911, 1 K. B. 463; Wms. Pers. Prop. 590, 17th ed.

(*i*) *Athenæum Life Assurance Society* v. *Pooley*, 3 De G. & J. 294; *Graham* v. *Johnson*, L. R. 8 Eq. 36, 43; *Re Palmer's, &c. Co.*, 1904, 2 Ch. 743; above, p. 620; cf. *Stoddart* v. *Union Trust, Ltd.*, 1912, 1 K. B. 181, where no claim to rescind the contract was made.

(*k*) Above, p. 741.

(*l*) Above, pp. 481-483, 504, 511, 518, 528, 531.

(*m*) See above, p. 748, n. (*g*).

in good faith and without notice of the fraud, the vendor could not set aside the sale as against such subsequent purchaser (*n*). But it seems that, until this stage of the contract has been reached, it remains, for the purposes of the rule in question, an executory contract, the parties' relations being those of mutual obligation only (*o*).

Mistake as to the person of the other party to the contract.

Where one enters into an apparent contract under a mistake as to the person with whom he is contracting, and the personality of the other party is a material element in determining his intention, there is no true consent and the contract is void (*p*); unless he be estopped from proving his real intention. Thus if A. be induced by means of personation or any other fraud to sign a contract for sale of his land to B. under the impression that he is contracting with C., there is no real consent, no true agreeemnt between the parties (*q*); the case is the same as if A. signed the contract in the belief that it was a mortgage (*r*); and A.'s supposed act in the law is altogether void (*s*). But if B., acting in good faith and without any fraudulent intent, go to A. and offer to buy A.'s land and A. sign an agreement accordingly, A. cannot, it is submitted, escape from the obligation so contracted by proving that he supposed that B. was C., if B. did nothing to induce the belief and a man of ordinary intelligence would reasonably and naturally suppose from A.'s acts and words, that he intended to contract with B. (*t*), and provided that B. were not aware that A. contracted with him under the impression that he was C. (*u*). If one

Estoppel from proving error in the person.

(*n*) For this purpose it is, as we have seen, immaterial that the subsequent purchaser has not the legal estate; above, p. 749, n. (*h*).

(*o*) See *Rose* v. *Watson*, 10 H. L. C. 672, 678.

(*p*) *Boulton* v. *Jones*, 2 H. & N. 564; Benjamin on Sale, 46, 2nd ed.; *Smith* v. *Wheatcroft*, 9 Ch. D. 223, 230; *Nash* v. *Dix*, 78 L. T. 445, 448, 449; *Said* v. *Butt*, 1920, 3 K. B. 497, 500-503.

(*q*) *Hardman* v. *Booth*, 1 H. & C. 803; *Hollins* v. *Fowler*, L. R. 7 H. L. 757; *Cundy* v. *Lindsay*, 3 App. Cas. 459; *Re Cooper*, 20 Ch. D. 611; and see *Gordon* v. *Street*, 1899, 2 Q. B. 641, where the defendant only pleaded that the contract was voidable for fraud, but might, it seems, have alleged that it was void on the ground of mistake; *Whitehorn* v. *Davison*, 1911, 1 K. B. 463, 479, 486; *Said* v. *Butt*, ubi sup.

(*r*) Above, p. 745.

(*s*) But see *Phillips* v. *Brooks, Ltd.*, 1919, 2 K. B. 243, where it was held that if A., pretending to be B., go *in person* to C. and buy goods of him on credit, the contract is voidable for fraud, but not void; because C. intended to sell the goods to the person he saw before him; and see Benjamin on Sales, 121, 6th ed.

(*t*) See above, p. 742, n. (*l*).

(*u*) See *Smith* v. *Hughes*, L. R. 6 Q. B. 597; see below, pp. 762, 763.

party to a sale of land be under a mistake as to the person of the other contractor, but the personality of the latter be not a material element in determining his intention, he cannot avoid the contract on the ground of his mistake. Thus, where B. bought land of A., ostensibly on his own account but really as agent for C., and it appeared that A., provided he got his price, would have been equally willing to sell to any other person, it was held that A. could not resist the specific performance of the contract (*x*).

Smith v. *Wheatcroft.*

Mistake as to the property sold or the price.

The same rule holds, subject to the same qualification, with regard to mistake in respect of the property to be sold or the price to be paid, if the mistake go to the whole substance of the consideration (*y*). Thus, if A. sell to B. his farm called The Grange, and A. have two farms of that name, one in Essex and one in Hampshire, and A. intended to sell his farm in Essex, but B. meant to buy the farm in Hampshire, there is no true consent and no contract between the parties. In this case there is a latent ambiguity in the description of the land purported to be sold, and so parol evidence is admissible to prove what land the parties intended to be sold, and it may be shown that they meant different things and their minds were not at one (*z*). But if one sign a contract for the purchase of a piece of land, of which the description in the contract is free from ambiguity and completely identifies it, he will be estopped from proving that he really intended to buy a different plot, if his mistake were due to his own inadvertence, and his outward acts and demeanour would naturally and reasonably lead the other party to suppose that he meant to buy the land described (*a*). On this point, as affecting the validity of the contract at law, the *dictum* of Collins, M. R., in the case of *Van Praagh* v. *Everidge* (*b*), is, it is submitted, misleading. The defendant in

Van Praagh v. *Everidge.*

(*x*) *Smith* v. *Wheatcroft,* 9 Ch. D. 223; *Nash* v. *Dix,* 78 L. T. 445, 448, 449; *Gordon* v. *Street,* 1899, 2 Q. B. 641, 647; and see above, n. (*s*).

(*y*) Above, pp. 740-745.

(*z*) *Raffles* v. *Wichelhaus,* 2 H. & C. 906 (sale of goods ex Peerless, there being two ships of that name); above, n. (*m*) to p. 742. See *Altham's case,* 8 Rep. 150b, 155; *Miller* v. *Travers,* 8 Bing. 244, 248; *Doe* d. *Gord* v. *Needs,* 2 M. & W. 129, 139, 140; *Doe* d. *Hiscocks* v. *Hiscocks,* 5 M. & W. 363, 368, 369; *Scriven* v. *Hindley,* 1913, 3 K. B. 534 (bidding for tow by mistake for hemp), decided on the ground that the vendor caused or contributed to cause the mistake; below, p. 769, n. (*g*).

(*a*) *Tamplin* v. *James,* 15 Ch. D. 215.

(*b*) 1903, 1 Ch. 434, 436, reversing *S. S.*, 1902, 1 Ch. 266.

that case, purely through his own inadvertence, bid at an auction for Lot 1 under the impression that he was bidding for Lot 2, and Lot 1 was knocked down to him accordingly. He afterwards declined to sign a memorandum of the contract: but the auctioneer signed it for him (*c*). The memorandum so signed ascribed a wrong date to the contract. The vendor sued for specific performance of the contract, which was granted by Kekewich, J. This involved the decision that there was a contract valid at law, as the Court has no jurisdiction to grant specific performance of a void agreement (*d*). In the Court of Appeal, however, the judgment of Kekewich, J., was reversed purely on the ground that, as the wrong date had been inserted in the contract, there was no sufficient memorandum to satisfy the Statute of Frauds (*e*). But it had also been argued that there was no true consent of the parties, their minds being directed to different things. On this point, Collins, M. R., said: "It is not clear to my mind that the parties ever were *ad idem;* I do not think that they were, but it is unnecessary to say anything further about that, as the plaintiff's case fails on the other point." This was a most unfortunate remark; it gives the impression that, if the memorandum had been sufficient to satisfy the statute, there would nevertheless have been no contract between the parties, because their minds were not at one; and the reporter has done his best to fix this impression by recording it in the headnote with a *semble*. But it is submitted that the learned judge overlooked the qualification above mentioned to the rule of law, that true consent is necessary to make a contract, and did not consider whether the defendant was not estopped from proving his real intention. And it is contended that, if the defendant so conducted himself (as apparently he did) that the auctioneer would naturally and reasonably infer that he meant to bid for Lot 1, then it was not open to him, if sued upon the apparent contract at law, to show that the intention which he had so manifested was not his true intention (*f*).

(*c*) See above, p. 22, n. (*d*).
(*d*) Fry, Sp. Perfce. §§ 277, 752, 3rd ed.
(*e*) See above, pp. 4, 7, and n. (*h*).
(*f*) Above, pp. 742-748, 750. It is further submitted that, according to the case of *Tamplin* v. *James*, 15 Ch. D. 215, the fact that the parties' minds were not in truth at one, was not of itself alone a sufficient ground for the defendant to resist specific performance, the mistake having been on his side only; and that, in the absence of hardship, he

A contract for the sale of land may also be void for want of true consent owing to a mistake as to the price. This may occur where one bids at an auction under a misapprehension as to the amount of his bidding (*g*); but in any such case the facts would be likely to raise the question whether the party mistaken were at liberty to prove his real intention or were estopped by his conduct and outward demeanour from doing so.

Mistake as to price.

It seems that upon a sale of lands, as on a sale of goods, any mistake in the physical contents or quantity of the thing sold, or the price, must necessarily go to the whole substance of the consideration at law; since a contract is broken at law in case of the smallest deficiency in quantity of the thing promised (*h*). And the same appears to be true of a mistake as to quantity of estate or title; as where one thought he was buying unincumbered freehold and the other intended to sell copyhold, or leasehold, or land subject to restrictive covenants; for, as we have seen (*i*), it is an essential condition of the sale of land that the vendor show a good title. But a mistake as to the quality of the thing sold does not necessarily avoid the contract of sale; for a warranty of quality is not an essential element of a sale; it is a collateral engagement to be attached to or omitted from it at the pleasure of the parties (*k*). It appears, however, that an apparent contract may be void on account of a mistake as to the quality of the thing sold, if the quality were an essential condition of the sale in this sense, that the party mistaken would not have entered into the contract at all unless he was to have a thing of that quality which he erroneously supposed to be promised to him (*l*).

Mistake as to the property or price goes to the root of the contract.

Mistake as to quality.

Warranty of quality.

would have been equally estopped in equity from alleging his mistake; see below, pp. 763-765; and see *Dewar* v. *Mintoft*, 1912, 2 K. B. 373, 375, 380, 383; above, p. 742, n. (*l*); *Scriven* v. *Hindley*, 1913, 3 K. B. 564, 566, decided on the ground that the vendor caused or contributed to cause the mistake.

(*g*) See *Phillips* v. *Bistolli*, 2 B. & C. 511, 512; Benjamin on Sale, 43, 2nd ed.

(*h*) See above, p. 676, and n. (*m*); *Stewart* v. *Kennedy*, 15 App. Cas. 108, 121; cf. above, p. 680.

(*i*) Above, pp. 31, n. (*b*), 181-183.

(*k*) See *Scott* v. *Littledale*, 8 E. & B. 815; Benjamin on Sale, 45, 2nd ed.; *Angel* v. *Jay*, 1911, 1 K. B. 666, 673, 674; *Shepherd* v. *Croft*, 1911, 1 Ch. 521. For an instance of a collateral warranty on a sale of land, see *De Lassalle* v. *Guildford*, 1901, 2 K. B. 215 (warranty that the drains of a house were in good order).

(*l*) See *Smith* v. *Hughes*, L. R. 6 Q. B. 597, 607-611; *Stewart* v. *Kennedy*, 15 App. Cas. 108, 121; *Angel* v. *Jay*, 1911, 1 K. B. 666, 673, 674; *Shepherd* v. *Croft*, 1911, 1 Ch. 521.

Mistake as to the quality of a thing sold.

With regard to mistakes in what may be termed the quality of land sold, as for example, whether it be fit for growing corn, grazing cattle, or for building, or whether a house or other building be in good repair or well drained, the reader must bear in mind the following distinctions:—The rule is *caveat emptor*. The purchaser should inspect and make inquiry concerning the property which he is buying (*m*). If he omit this precaution, he buys at his own risk, and cannot complain of defects in the quality of the thing, unless they be not discoverable by inspection and materially interfere with the enjoyment promised by the contract (*n*), or by any representation which induced the contract, or be fraudulently concealed (*o*). In the case of the sale of land, defects which are in one sense defects of quality, as interfering with the physical enjoyment of the land sold, may involve a breach of the contract because they are inconsistent with the discharge of the vendor's obligation of showing a good title. Thus the existence of a right of way, an underground culvert, or a public sewer, not discoverable by inspection and interfering materially with the enjoyment of the property sold, is a good ground of objection to the title (*p*). But in the absence of fraud, a defect of quality, not amounting to a breach of the obligation to show a good title, is no ground of objection on the purchaser's part, unless the vendor expressly or impliedly warranted or promised that the property sold should have the quality, in which it is deficient. And no warranty is implied by the mere sale of land that it is fit for any particular purpose (*q*). For example, if one sell a house

The rule is *caveat emptor*.

Defect of quality amounting to a defect of title.

No warranty of quality implied by the sale of land.

(*m*) *Edwards-Wood* v. *Majoribanks*, 7 H. L. C. 806, 809-811; Sug. V. & P. 335; above, p. 575.

(*n*) Above, p. 576.

(*o*) See below, p. 759.

(*p*) *Ashburner* v. *Sewell*, 1891, 3 Ch. 405; *Re Puckett and Smith's Contract*, 1902, 2 Ch. 258; *McGrory* v. *Alderdale Estate Co.*, 1918, A. C. 503; *Yandle* v. *Sutton*, 1922, 2 Ch. 199; above, p. 576. See also *Wilde* v. *Gibson*, 1 H. L. C. 605, where the defect, if discovered before conveyance, would certainly have been a good ground of objection to the title; above, pp. 576, 613, 614.

(*q*) *Sutton* v. *Temple*, 12 M. & W. 52; *Hart* v. *Windsor*, ib. 68; *Keates* v. *Cadogan*, 10 C. B. 591; *Spoor* v. *Green*, L. R. 9 Ex. 99, 109; *Wilson* v. *Finch Hatton*, 2 Ex. D. 336, 342, 343; Scrutton, J., *Hart* v. *Rogers*, 1916, 1 K. B. 646, 648; *Cheater* v. *Cater*, 1918, 1 K. B. 247. These are all cases of agreement to lease land: but the principle is exactly the same in the case of an agreement to sell land; see above, p. 90, n. (*m*). And the case of a lease seems stronger than that of a sale, since occupation leases are generally taken with the object of using the land in some particular way, as farming it.

which is out of repair, or ill-drained, or infested with vermin, or otherwise unfit for human habitation, without warranting or representing that it is in good repair, well-drained or fit for habitation, the purchaser has no legal or equitable cause of complaint (*r*). This doctrine applies not only to defects discoverable by inspection or inquiry but also to latent defects of quality. Where these are unknown to the vendor, and do not materially interfere with the enjoyment promised by the contract, or any representation which induced the contract, they are no ground for the purchaser to avoid the contract or resist its specific performance (*s*). And the same rule applies at law, although the latent defect be known to the vendor. Thus if one sell his house situate in a street of a disreputable character, the purchaser cannot avoid the contract at law, unless the vendor sold the house as a residence for a respectable family or otherwise promised or represented that it was fit for that purpose (*t*). *A fortiori*, if land or a house be sold with all its faults (*u*), or

Latent defects of quality.

Unknown latent defects.

Latent defect known to the vendor.

Sale of a thing with all its faults.

(*r*) *Keates* v. *Cadogan*, 10 C. B. 591; *Cook* v. *Waugh*, 2 Giff. 201; *Cavalier* v. *Pope*, 1905, 2 K. B. 757, 763, 764, affirmed, 1906, A. C. 428; *Ryall* v. *Kidwell*, 1914, 3 K. B. 135, 138.

(*s*) *Lucas* v. *James*, 7 Hare, 410, 418; see *Hope* v. *Walter*, 1899, 1 Ch. 879, 883, reversed, 1900, 1 Ch. 257; below, p. 760.

(*t*) See *Parkinson* v. *Lee*, 2 East, 314, 322, 323, 324; *Bywater* v. *Richardson*, 1 A. & E. 508; *Chanter* v. *Hopkins*, 4 M. & W. 399; *Cornfoot* v. *Fowke*, 6 M. & W. 358 (the correctness of the decision in this case is discussed in the next Chapter: but it seems clear that if there had been no representation at all, there would have been no cause of action); *Gompertz* v. *Bartlett*, 2 E. & B. 849, 855; *Jones* v. *Just*, L. R. 3 Q. B. 197, 202; *Ward* v. *Hobbs*, 4 App. Cas. 13, 24, 25, 26, 29. It is respectfully submitted that the *dictum* of Joyce, J., in *Carlish* v. *Salt*, 1906, 1 Ch. 335, 341, as to the vendor's duty of disclosure, is not well founded; see the author's criticism in 50 Sol. J. 611. Note that the statement in *Horsfall* v. *Thomas*, 1 H. & C. 90, 100, as to a *manufacturer's* duty to disclose a defect known to him and not discoverable by inspection applies only to a contract to make a particular thing to order, when there is an implied warranty that it shall be reasonably fit for the purpose for which it is ordinarily used or specially ordered; *Jones* v. *Just*, L. R. 3 Q. B. 197, 203; Benjamin on Sale, 525, 2nd ed. *Horsfall* v. *Thomas* does not therefore support the proposition in Fry, Sp. Perf. § 708, 3rd ed., for which it is vouched. It is submitted that the judgment of Parker, J., in *Shepherd* v. *Croft*, 1911, 1 Ch. 521, 525, 528, 530, 531, supports the view put forward in the text. It seems obvious that in that case no claim for compensation could have been admitted if the vendor had not sold the land as possessing building advantages.

(*u*) *Baglehole* v. *Walters*, 3 Camp. 154; *Pickering* v. *Dowson*, 4 Taunt. 779; *Ward* v. *Hobbs*, 4 App. Cas. 13; Benjamin on Sale, 384, 2nd ed.; Sug. V. & P. 333, where note that the proposition stated at the beginning of § 21 cannot be maintained; see n. (*y*), below, p. 756.

with all risks of error in the description (*x*), the purchaser cannot reject it on account of a latent defect of quality, of which the vendor was aware. In equity, however, the rule has been suggested that a latent defect of quality, which is not discoverable by any inspection or inquiry that a prudent purchaser might reasonably be expected to make, and is known to and not disclosed by the vendor, is a good ground for refusing to grant specific performance at the vendor's suit (*y*). But it is submitted that this rule is too broadly stated, and is properly subject to the qualification that the defect must be such as will materially interfere with the enjoyment *promised by the contract* or the vendor's representation, or the concealment must be fraudulent (*z*). Thus in *Lucas* v. *James* (*a*), where the rule is stated, a gentleman entered into negotiations for taking a lease of a house, the lessor being aware that he wanted it for his own residence. He broke off the negotiations on the ground that the street, in which the house was situated, was of so disreputable a character that the house was unfit for the purpose of a gentleman's private residence. The lessor brought a suit for specific performance, alleging that a contract had been concluded. Wigram, V.-C., dismissed the bill with costs on the ground that no contract had been formed: but incidentally he suggested the rule as above mentioned. But it appears that in that case the lessor was clearly promising a house fit for the required purpose. If one sell a house situate next door to a house known to the vendor but not generally known to be a disorderly house, without promising that the house sold is fit for a gentleman's residence, and without making any promise or representation at all as to the character of the neighbourhood or the street, why should specific performance be refused at the vendor's suit? Lord St. Leonards maintained that the vendor's silence as to a known latent defect of quality could

The rule in equity as to mere silence about a defect of quality.

***Lucas* v. *James*.**

(*x*) *Brownlie* v. *Campbell*, 5 App. Cas. 925.

(*y*) *Lucas* v. *James*, 7 Hare, 410, 418; *Hope* v. *Walter*, 1899, 1 Ch. 879, 883. Note that the rule stated in *Lucas* v. *James* is qualified with "perhaps"; and that the statement of the law in Sug. V. & P. 2, 333, which the rule purports to follow, was apparently founded on a case of *Mellish* v. *Motteux*, Peake, 115, expressly overruled in *Baglehole* v. *Walters*, 3 Camp. 154; and *Pickering* v *Dowson*, 4 Taunt. 779. 1 Dart, V. & P. 93, 5th ed.; 103, 6th ed.; 101, 7th ed., simply follows Sugden's statement.

(*z*) The decision of Parker, J., in *Shepherd* v. *Croft*, 1911, 1 Ch. 521, appears to support the qualification suggested in the text. See above. pp. 753, 754.

(*a*) 7 Hare, 410.

hardly be distinguished from his active concealment of a defect which would otherwise be patent (*b*). But it is held at law that this is not so (*c*). The active concealment alone is a fraud; mere silence is no breach of any legal duty, unless the vendor promised some quality incompatible with the existence of the defect, or were under a particular obligation to disclose defects, such as arises in the case of a contract of insurance, which is a contract *uberrimæ fidei* (*d*). And it is stated by Sir Edward Fry in his treatise on Specific Performance that mere silence as regards a material fact, which one party is not under an obligation to disclose to the other, cannot be a ground for rescission of a contract or a defence to specific performance (*e*). And this rule has since been followed in equity, specific performance having been decreed at suit of one, who kept silence as to a latent defect, which was known to him, but which he had not warranted or represented not to exist (*f*). So also it is considered that mere silence on the purchaser's part as to some fact known to him alone and enhancing the value of the property sold (such as the existence of valuable minerals) is no ground in equity for the vendor to avoid or resist specific performance of the contract (*g*). At the same time, it must be

Silence of the purchaser about a fact enhancing the value.

(*b*) Sug. V. & P. 333, 334: but see p. 335.

(*c*) Above, p. 755, and n. (*t*); below, p. 761.

(*d*) See *Expte. Whittaker*, L. R. 10 Ch. 446; *Brownlie* v. *Campbell*, 5 App. Cas. 925, 932, 937, 938, 944, 950, 954; *Shepherd* v. *Croft*, 1911, 1 Ch. 521. As to the *dictum* of Joyce, J., in *Carlish* v. *Salt*, 1906, 1 Ch. 335, 340, see above, p. 755, n. (*t*).

(*e*) Fry, Sp. Perf. §§ 705, 713, 3rd ed.

(*f*) *Turner* v. *Green*, 1895, 2 Ch. 205, where specific performance of an agreement to compromise an action was enforced at suit of one, who had, on making the agreement, kept silence as to the fact that he had just been defeated in a step in the proceedings; *Greenhalgh* v. *Brindley*, 1901, 2 Ch. 324, where specific performance was enforced at suit of a vendor, who had sold a house with windows overlooking a stranger's land, and had not mentioned that he only enjoyed access of light by the stranger's licence; see above, p. 600, n. (*ll*); *Re Ward and Jordan's Contract*, 1902, I. R. Ch. 73; *Seddon* v. *North Eastern Salt Co., Ltd.*, 1905, 1 Ch. 326, 334, 335; *Shepherd* v. *Croft*, ubi sup.; *Smith* v. *Colbourne*, 1914, 2 Ch. 533, following *Greenhalgh* v. *Brindley*, ubi sup.

(*g*) *Fox* v. *Mackreth*, 2 Bro. C. C. 400, 420; *Turner* v. *Harvey*, Jac. 169, 178; *Walters* v. *Morgan*, 3 De G., F. & J. 718, 723; *Coaks* v. *Boswell*, 11 App. Cas. 232, 235, 236; *Percival* v. *Wright*, 1902, 2 Ch. 421, 426; Sug. V. & P. 5; 1 Dart, V. & P. 106, 5th ed.; 118, 6th ed.; 114, 7th ed.; Fry, Sp. Perf. §§ 713, 714, 3rd ed. It is submitted that the *dictum* of Kindersley, V.-C., to the contrary in *Falcke* v. *Gray*, 4 Drew. 651, 5 Jur. N. S. 645, 646, is opposed to the main current of authority and would not now be followed; see Fry, Sp. Perf. §§ 444-446, 3rd ed.

remembered that in granting or refusing the remedy of specific performance, the Court may take into consideration circumstances which would be of no account at law and would not affect the question of the rescission of the contract (*h*). Thus the Court may refuse specific performance at suit of a party whose conduct has been wanting in good faith or fairness (*h*), or against a party on whom the specific performance of the contract would inflict a great hardship (*i*); and it seems that on these grounds the Court *may possibly* decline to grant specific performance at suit of either vendor or purchaser, who has concealed a fact known to him and material to the value of the property sold, notwithstanding that such concealment may not amount to positive fraud (*k*). In a recent case, however, where a vendor kept silence in a manner which the Court considered to be unfair, that was not allowed to stand in the way of his obtaining the remedy of specific performance, though it was made a ground for depriving him of costs (*l*). But it should be noted that non-disclosure, on the sale of land, of a fact material to the *title* of the property sold stands on a different footing from non-disclosure of a fact relating to its *quality*. The vendor's title is a matter which is exclusively within his own knowledge, and he is bound to state it fairly; and his suppression of a fact material to the title may, according to the degree in which it affects the title, be a ground for rescinding the contract or for resisting its specific performance (*m*).

Specific performance may be refused on grounds of unfairness or hardship.

Non-disclosure of a fact material to the title.

(*h*) Above, pp. 36, 37; below, n. (*k*), and pp. 766, nn. (*i*), (*m*).

(*i*) See *Wedgwood* v. *Adams*, 6 Beav. 600; *Watson* v. *Marston*, 4 De G., M. & G. 230; *Falcke* v. *Gray*, 4 Drew. 651, 659; *Webster* v. *Cecil*, 30 Beav. 62; *Durham* v. *Legard*, 34 Beav. 611; *Preston* v. *Luck*, 27 Ch. D. 497, 506; *Rudd* v. *Lascelles*, 1900, 1 Ch. 815, 820; *Goddard* v. *Jeffreys*, 30 W. R. 269, 270; *Van Praagh* v. *Everidge*, 1902, 2 Ch. 266, 271, reversed on other grounds, 1903, 1 Ch. 434; above, p. 37; below, p. 765.

(*k*) See *Ellard* v. *Llandaff*, 1 Ball & B. 241, where a lessee for a life negotiating for a new lease concealed the fact that *cestui que vie* was at the point of death: this decision is, however, adversely criticised in *Turner* v. *Green*, 1895, 2 Ch. 205; *Fothergill* v. *Phillips*, L. R. 6 Ch. 770, where a purchaser concealed the fact that he had wrongfully abstracted a large quantity of minerals from under the land sold; Fry, Sp. Perf. §§ 402, 715, 717, 3rd ed.

(*l*) *Greenhalgh* v. *Brindley*, 1901, 2 Ch. 324; see *Smith* v. *Colbourne*, 1914, 2 Ch. 533, 541, where the vendor obtained a decree for specific performance with costs.

(*m*) *Edwards* v. *McLeay*, G. Coop. 308, 311, affd. 2 Swanst. 287; *Edwards* v. *Wickwar*, L. R. 1 Eq. 68; *Mostyn* v. *West Mostyn Coal and Iron Co.*, 1 C. P. D. 145; *Re Marsh and Earl Granville*, 24 Ch. D.

On the other hand, if the vendor represent that a house is in good repair (*n*), or is not damp (*o*), or that the drains are in good order (*p*), or the cellars dry (*q*), or that a farm is in a high state of cultivation (*r*), or sell land as being fit for building purposes (*s*), or as business premises (*t*), then any latent defect, which prevents this representation from being fulfilled, will be a good ground of objection by the purchaser to his completing the contract (*u*). If, however, the defect were patent or obvious, then the purchaser may be obliged to perform the contract, notwithstanding the representation, on the ground that he must be taken to have bought with notice of the defect (*x*). But any *active* concealment of defects which would otherwise be discoverable by inspection is a fraud (*y*); and if a purchaser be deceived thereby (*z*) he may avoid the contract accordingly. Thus if cracks in the walls of a house be papered or painted over with intent to conceal them, and the house be then sold, though without any warranty or verbal representation as to its state of repair, to a purchaser, who has inspected it, the contract is voidable for fraud (*a*). And any conduct calculated to mislead a purchaser with respect to some material fact, or

Representation that land is fit for a particular purpose.

Representation obviously inapplicable.

Active concealment of defects.

Misleading conduct.

11; *Heywood* v. *Mallalieu*, 25 Ch. D. 357; *Nottingham Brick and Tile Co.* v. *Butler*, 16 Q. B. D. 778; *Reeve* v. *Berridge*, 20 Q. B. D. 523, 528; *Re Davis and Cavey*, 40 Ch. D. 601; *Re White and Smith's Contract*, 1896, 1 Ch. 637; *Re Haedicke and Lipski's Contract*, 1901, 2 Ch. 666; *Carlish* v. *Salt*, 1906, 1 Ch. 335, as to which case see the author's criticism in 50 Sol. J. 611; above, pp. 66, n. (*b*), 69, 70, 182-184, 190, 339, 573, n. (*p*); below, Chap. XIV. § 1.

(*n*) *Grant* v. *Munt*, G. Coop. 173; *Dyer* v. *Hargrave*, 10 Ves. 505; *Cree* v. *Stone*, Times Newspaper, 10th May, 1907.

(*o*) *Strangways* v. *Bishop*, 29 L. T. O. S. 120.

(*p*) *De Lassalle* v. *Guildford*, 1901, 2 K. B. 215; *Cree* v. *Stone*, ubi sup.

(*q*) *Lamare* v. *Dixon*, L. R. 6 H. L. 414.

(*r*) *Dyer* v. *Hargrave*, 10 Ves. 505.

(*s*) *Re Puckett and Smith's Contract*, 1902, 2 Ch. 258; *Dougherty* v. *Oates*, 45 Sol. J. 119; cf. *Shepherd* v. *Croft*, 1911, 1 Ch. 521, 528.

(*t*) *Re Davis and Cavey*, 40 Ch. D. 601; above, p. 190.

(*u*) Above, pp. 575, 576.

(*x*) Above, p. 576; *Dyer* v. *Hargrave*, 10 Ves. 505, 508; *Grant* v. *Munt*, G. Coop. 173, 177; Sug. V. & P. 331, 332.

(*y*) *Pickering* v. *Dowson*, 4 Taunt. 779, 785; *Schneider* v. *Heath*, 3 Camp. 506, 508.

(*z*) See *Horsfall* v. *Thomas*, 1 H. & C. 90, dissented from by Cockburn, C. J., *Smith* v. *Hughes*, L. R. 6 Q. B. 597, 605, and doubted in Benjamin on Sale, 385, 2nd ed. The decision seems, however, to be in accordance with the law laid down in the cases cited above, p. 755, nn. (*t*), (*u*), and by Selborne, C., in *Coaks* v. *Boswell*, 11 App. Cas. 232, 236. And see Pollock on Torts, 300, 11th ed.

(*a*) See Sug. V. & P. 333-335.

to divert him from inspection or inquiry, which would discover a defect known to the vendor, is equally fraudulent, and may be a ground for avoiding the contract at law as well as resisting its specific performance (*b*). It should be noted that an innocent misrepresentation as to the quality of land sold may be a good ground for the purchaser to resist the specific performance of the contract, notwithstanding that it be insufficient to procure the contract to be rescinded (*c*). Thus where a house let on a quarterly tenancy was sold as an eligible freehold property for investment, but was being used, unknown to the vendor, as a brothel, the Court of Appeal refused to oblige the purchaser to perform the contract specifically, but also declined to rescind the contract (*d*). The reason given by the Court was that the purchaser, if forced to complete, would be liable under the Criminal Law Amendment Act, 1885, to be fined unless he evicted the tenant. It is submitted that this decision must be referred, in principle, to the ground that the defect was incompatible with the enjoyment *promised by the contract*, coupled, possibly, with that of great hardship on the purchaser (*e*). A property, from which the rent-paying occupier must be immediately ejected, on pain of the purchaser becoming liable to criminal proceedings, hardly fulfils the expectation of enjoyment, which is raised by the description of an eligible freehold property for investment (*f*). Or perhaps the principle may be put in this way—that the Court will not enforce the specific performance of a contract to purchase a thing, which is *positively noxious* in quality, notwithstanding that there were no warranty of quality, and that in other respects the thing answer the description. For example, a house may be so ill-drained that it is dangerous to live in it; the vendor may be aware that illness has been actually caused by the state of the drains and maintain silence in this respect; and yet the purchaser may be unable to avoid performance of the contract. He buys at his own risk; he ought to have the drains tested for

Specific performance may be resisted in some cases where the contract cannot be rescinded.

Hope v. *Walter.*

Specific performance not granted where the thing sold is *positively* noxious in quality.

(*b*) *Walters* v. *Morgan,* 3 De G., F. & J. 718, 724; *Coaks* v. *Boswell,* 11 App. Cas. 232, 235, 236.

(*c*) See *Kennedy* v. *Panama, &c. Mail Co.,* L. R. 2 Q. B. 580; *Re Banister, Broad* v. *Munton,* 12 Ch. D. 131; above, pp. 185, 189-194.

(*d*) *Hope* v. *Walter,* 1900, 1 Ch. 257, reversing the decision of Cozens-Hardy, J., 1899, 1 Ch. 879, as to specific performance, and affirming it on the other point.

(*e*) Above, pp. 755, 759.

(*f*) See *Hope* v. *Walter,* 1900, 1 Ch. 259.

himself; and drains may be tested and put right without any extraordinary danger to the workmen (*g*). If, however, a house were infected with the germs of disease, such as plague or smallpox, so that any person entering it must incur the danger of catching the malady, and the vendor concealed this fact, it is thought that he could not enforce specific performance; for the thing sold was actively harmful (*h*). The house might indeed be disinfected, but only at the risk of the health and life of those who entered it to do so. It appears therefore that where one has bought land or a house under a mistaken impression as to its quality, he must in general abide by the consequences of his own mistake, unless the vendor made by warranty or representation some promise as to the quality, or actively concealed some defect which was known to him.

Purchase under a mistaken impression as to quality.

Not only is there no legal obligation upon a vendor of land to disclose to the purchaser any defects known to him in the quality of the thing sold, but further the vendor is not bound to disabuse the purchaser of any erroneous belief, which the purchaser has formed, and which the vendor knows that the other has formed, as to the quality of the purchased property (*i*). A vendor may well sell a house, which has got dry rot in all the woodwork and is badly drained, to a purchaser, who knows nothing of these defects, but believes to the knowledge of the vendor that the house is in good repair and well drained, and yet the purchaser will not be entitled to claim the rescission of the contract; provided always that the vendor made no representation as to the quality of the thing sold, and did not actively conceal the defect. And this is equally the case, even though the purchaser suppose the vendor to be warranting the quality of the thing sold, provided that the vendor were not aware of the purchaser's belief in this respect and had done nothing to induce it. So long as the vendor knows no more than that the purchaser is mistaken as to the quality, the purchaser's further erroneous belief that the vendor is warranting

Vendor not bound to disabuse purchaser of his erroneous belief as to the quality of the thing sold.

It does not alter the case that the purchaser believed the vendor to be warranting the quality, if the vendor did not know this.

(*g*) See above, pp. 754-757.

(*h*) See *Cornfoot* v. *Fowke*, 6 M. & W. 358, 380, 381; *Chester* v. *Powell*, 52 L. T. 722, 723. But apparently this fact would not be sufficient ground for rescinding the contract; see above, p. 755, and n. (*t*); *Ward* v. *Hobbs*, 4 App. Cas. 13, 24, 25, 29.

(*i*) *Keates* v. *Cadogan*, 10 C. B. 591; *Edwards-Wood* v. *Majoribanks*, 7 H. L. C. 806, 809; *Smith* v. *Hughes*, L. R. 6 Q. B. 597, 607; Fry, Sp. Perf. §§ 705, 713, 3rd ed.; *Turner* v. *Green*, 1895, 2 Ch. 205.

the quality is no ground for his avoidance of the contract (*k*). And it does not appear that the above circumstances, namely, the vendor's knowledge of the purchaser's erroneous belief or the purchaser's further mistaken impression that the vendor is warranting the quality (if not known to the vendor), are of themselves a sufficient ground to enable the purchaser to resist the specific performance of the contract (*l*), unless he can move the Court on the grounds of unfairness or hardship (*m*). If, however, the vendor know that the purchaser believes him to be warranting the quality of the thing sold, and agree to the contract without the intention of warranting according to the purchaser's expectation, but without disabusing the purchaser of his belief, in that case there is no true consent of the parties, and on this ground the contract is void (*n*). The same law seems applicable where one, who knows that there is a mistake in the terms of an offer, accepts it unconditionally and without correcting the mistake, being minded to take advantage of the other's error. Thus if A. offer to sell to B. Blackacre and Whiteacre for 2,000*l*., and B., knowing that A. really means to offer Blackacre only or to ask 4,000*l*., but intending to hold A. to the letter and not to the spirit of his proposal, at once close with the offer, it is thought that A. is not estopped from proving his mistake, and the contract is void for want of true consent. For B. knew that A. thought that B. was promising to take Blackacre only or to pay 4,000*l*.; and he ought not to have sought to take advantage of such a mistake (*o*). In a case like this the acceptance of the offer, with knowledge of the mistake in its terms, appears to be plainly fraudulent; and the acceptor may not take advantage of his own wrong. The other party therefore has the choice of two alternatives. He may either treat the contract as altogether void by reason of his

But if the vendor knew of this belief, the contract is void for want of true consent.

Acceptance of an offer which the acceptor knows to be mistaken.

(*k*) See *Smith* v. *Hughes*, L. R. 6 Q. B. 597.
(*l*) See cases cited above, p. 757, n. (*f*).
(*m*) Above, p. 758.
(*n*) *Smith* v. *Hughes*, L. R. 6 Q. B. 597.
(*o*) See *Webster* v. *Cecil*, 30 Beav. 62, as explained in *Tamplin* v. *James*, 15 Ch. D. 215, 221; *Paget* v. *Marshall*, 28 Ch. D. 255, 265. The case appears to be governed by the same principle as is applied in holding that a man is not bound by the exact terms of a description or representation which he has put forward or made to another, where the other has notice that its terms are inaccurate; above, pp. 576, 759, and n. (*x*); *Calverley* v. *Williams*, 1 Ves. jun. 210; *Townshend* v. *Stangroom*, 6 Ves. 328, 341; and see *Scriven* v. *Hindley*, 1913, 3 K. B. 564, 566, where the auctioneer accepted a bid although he thought it was made by mistake.

mistake, or he may affirm and enforce the contract according to the terms which he had really intended to propose, treating the acceptance as an assent to a contract, of the real terms of which the acceptor had notice, and claiming to have the written agreement rectified on account of a mistake *common to both parties* in the expression of its terms. And if he choose this alternative, the acceptor will be estopped by his conduct from setting up the want of true consent as a ground for avoiding the contract, or from objecting to rectification on the ground that the mistake was made by the other party alone, and was not common to both of them (*p*).

Mistake as avoiding true consent in equity.

So far, in discussing the subject of mistake as excluding any true consent between the parties, and so avoiding the contract altogether, we have dealt mainly with the rules of the common law (*q*). Where the contract is void on this ground, the parties are in the same position in equity as at law. There can be no question of any order for specific performance of the contract, for this remedy is, as we have seen (*r*), only granted to enforce a valid contract. But where one party has entered into the contract under a mistake, which is not shared by the other, and the one is estopped at law from setting up his mistake and proving his true intention, the parties are not always in the same position, as regards the equitable remedies to enforce the contract, as they are at law. Thus where the vendor makes a mistake in the preparation of the particulars of sale, and includes therein more than he really meant to sell (*s*), but the description is precise, so that a man would naturally and reasonably suppose that the vendor meant to sell what he actually offered, the contract is enforceable against the vendor at law, since he would be estopped from proving his mistake (*t*). The vendor is also estopped from setting up his mistake in equity to this extent, that he is not entitled to claim the rescission of the contract (*u*),

Unilateral mistake in equity.

(*p*) See *Garrard* v. *Frankel*, 30 Beav. 445; *Harris* v. *Pepperell*, L. R. 5 Eq. 1; *Bloomer* v. *Spittle*, L. R. 13 Eq. 427; *Paget* v. *Marshall*, 28 Ch. D. 255, as explained in *May* v. *Platt*, 1900, 1 Ch. 616, 623; Pollock on Contract, 538, 9th ed.; below, pp. 780 *sq.*

(*q*) Above, pp. 741 *sq.*

(*r*) Above, p. 752.

(*s*) See *Re Fawcett and Holmes*, 42 Ch. D. 150; above, p. 680; *May* v. *Platt*, 1900, 1 Ch. 616.

(*t*) Above, pp. 742, 745, 747, 750.

(*u*) *Alvanley* v. *Kinnaird*, 2 Mac. & G. 1, 7, 8; *Scott* v. *Littledale*, 8 E. & B. 815.

or to insist himself on its specific performance, except on the terms of conveying the whole of the property described, if he be able to do so (*x*). If he be not, he may, as we have seen (*y*), enforce specific performance with an abatement of the purchase money, where the deficiency is insubstantial or the contract contained an express stipulation as to compensation for misdescription. But if the purchaser sue for specific performance of the contract, then the vendor may in certain circumstances be entitled to set up his mistake as a defence to the action. This is owing to the discretionary nature of the remedy of specific performance, and to the fact that in granting or withholding such relief the Court will have regard to circumstances outside the contract and especially to the conduct of the parties, and may refuse specific performance on the ground of great hardship (*z*). But it is not in every case that a party sued for specific performance may avail himself of his own mistake as a defence to the action. If the mistake were entirely due to the defendant's own carelessness or inadvertence, the plaintiff having done nothing to induce or contribute to the error, nor having sought knowingly to take advantage of it, and if it will inflict no great hardship on the defendant to enforce him to perform the contract specifically, then it appears that the defendant will be equally precluded from resisting specific performance in equity as from avoiding his liability at law (*a*). Thus where the vendor has in these circumstances inadvertently included in the particulars of sale more than he meant to sell, he will nevertheless be obliged at the purchaser's suit to perform the contract specifically, and must convey the whole property described, if he can; or if he cannot, he must convey what he can with a proportionate abatement of the price (*b*). So it appears that, in the like circumstances, a purchaser who has by his own mistake signed a contract to buy a property smaller than he supposed it was (*c*), or even different from that which he in-

(*x*) *Manser* v. *Back*, 6 Hare, 443, 447, 448; *Alvanley* v. *Kinnaird*, 2 Mac. & G. 1, 8.

(*y*) Above, pp. 676, 680-682.

(*z*) Above, pp. 37, 758.

(*a*) *Tamplin* v. *James*, 15 Ch. D. 215; *Goddard* v. *Jeffreys*, 30 W. R. 269, 270; *Eastes* v. *Russ*, 1914, 1 Ch. 468, 474, 480.

(*b*) *Mackenzie* v. *Hesketh*, 7 Ch. D. 675; *Dyas* v. *Stafford*, 7 L. R. Ir. 590, 605, 606.

(*c*) *Tamplin* v. *James*, 15 Ch. D. 215; *Goddard* v. *Jeffreys*, 30 W. R. 269.

tended to buy (*d*), cannot resist specific performance on the ground of his mistake. But where it would be a great hardship on the party mistaken to oblige him to perform the contract specifically, the Court will not grant this relief to the other party, but will leave him to pursue his remedy at law (*e*). Thus where one wrote a letter offering by mistake to sell his land for 1,250*l.*, meaning to say 2,250*l.*, and the offer was accepted, the Court refused to grant specific performance at the purchaser's suit (*f*). And where a vendor has by his own mistake included in the particulars of sale much more than he meant to sell, it appears that the Court may decline, on the ground of hardship, to order the specific performance of the contract at the purchaser's suit, unless he elect to take, without compensation, what the vendor really intended to sell (*g*). So also we have seen that, where a vendor has innocently made a serious error of description to his own disadvantage, and has so purported to sell a much larger property than he has, the purchaser will not be entitled to enforce specific performance with compensation, if this would be a great hardship on the vendor (*h*). And where one party has contributed in any way to the other's mistake, as

Specific performance against a party mistaken may be refused on the ground of hardship.

Where one has contributed to the other's mistake.

(*d*) *Van Praagh* v. *Everidge*, 1902, 2 Ch. 266, Kekewich, J., reversed on other grounds, 1903, 1 Ch. 434 (above, p. 751), following the rule laid down in *Tamplin* v. *James*, ubi sup., in preference to the decision in *Malins* v. *Freeman*, 2 Keen, 25, where specific performance was refused at the vendor's suit in exactly the same circumstances. But note that Kekewich, J., held that in the circumstances of the case before him it was no great hardship to enforce specific performance against the purchaser, and expressly recognised that, if this were not so, specific performance might have been refused; see 1902, 2 Ch. 271, 272. It is respectfully submitted, however, that the learned judge was right in recognising that the case of *Tamplin* v. *James* set definite limits to the equitable rule expressed of old in the proposition that the Court will refuse specific performance on the ground of mistake (see *Neap* v. *Abbott*, C. P. Coop. (1837-8), 333; 1 C. P. Coop. t. Cottenham, 382; *Manser* v. *Back*, 6 Hare, 443, 447, 448). The decision in *Tamplin* v. *James* shows that the Court will not now refuse specific performance on the ground of unilateral mistake alone, and that, notwithstanding that the parties' minds in making the contract were not *in truth* at one, a defendant to an action in equity for specific performance of the contract may be estopped from saying so. See above, p. 752, and n. (*f*).

(*e*) *Tamplin* v. *James*, 15 Ch. D. 215, 217, 221; *Goddard* v. *Jeffreys*, 30 W. R. 269, 270; *Van Praagh* v. *Everidge*, 1902, 2 Ch. 266, 271, 272.

(*f*) *Webster* v. *Cecil*, 30 Beav. 62; see above, p. 762; *Wood* v. *Scarth*, 2 K. & J. 33.

(*g*) *Alvanley* v. *Kinnaird*, 2 Mac. & G. 1, 7; *Durham* v. *Legard*, 34 Beav. 611, 614; *Rudd* v. *Lascelles*, 1900, 1 Ch. 815, 820; above, p. 677.

(*h*) Above, p. 679.

if the particulars of or contract for sale contain any misrepresentation or any ambiguity likely to mislead a man of ordinary intelligence using ordinary care, then the other party may resist the specific performance of the contract on the ground of his mistake (*i*). If the description of the land sold in the written agreement erroneously comprise more than the vendor means to sell, but the purchaser have notice, before or at the time of sale, what land the vendor really intends to part with, the purchaser cannot enforce the specific performance of the contract according to the written description; for the vendor may in defence prove by evidence outside the written agreement that it does not express the parties' true intention (*k*). And as we have seen (*l*), if in such case the vendor have no title to the land erroneously comprised in the contract, the purchaser is not entitled to claim specific performance with compensation. If one party were aware of the other's mistake and wrongfully took advantage of it, he cannot enforce the specific performance of the contract against the party mistaken (*m*). Indeed in this case, as we have seen (*n*), it may be contended that the contract is void at law.

Where one has notice of an error in the particulars.

Where one knew of the other's mistake and sought to take advantage of it.

Common mistake as to some fact which is a condition precedent to the formation of a contract.

Not only may a contract be void on account of a mistake excluding any real consent of the parties, where the mistaken party is not estopped from asserting his error (*o*); it may also be void where the parties' minds are really at one as regards the present intention of contracting, but they are under a *common mistake* with respect to some fact, the existence of which is a condition precedent to their uniting in the formation of a contract. On this ground a contract for the sale of a thing which both parties believe to be in existence, but which has really ceased to exist, is altogether void (*p*). For example, where an

(*i*) *Higginson* v. *Clowes*, 15 Ves. 516; *Swaisland* v. *Dearsley*, 29 Beav. 430; *Tamplin* v. *James*, 15 Ch. D. 215, 216, 221; *Goddard* v. *Jeffreys*, 30 W. R. 269, 270; *Van Praagh* v. *Everidge*, 1902, 2 Ch. 266, 271, 272.

(*k*) *Calverley* v. *Williams*, 1 Ves. jun. 210; *Townshend* v. *Stangroom*, 6 Ves. 328, 341; above, pp. 681, 759, and n. (*x*); below, pp. 770 *sq.*, 775.

(*l*) Above, p. 679.

(*m*) *Webster* v. *Cecil*, 30 Beav. 62, as explained in *Tamplin* v. *James*, 15 Ch. D. 215, 221, 222.

(*n*) Above, p. 762.

(*o*) Above, pp. 742 *sq.*

(*p*) *Hitchcock* v. *Giddings*, 4 Price, 135; *Strickland* v. *Turner*, 7 Ex. 208; *Couturier* v. *Hastie*, 5 H. L. C. 673.

apparent contract is made for the sale of a life estate, both parties believing the tenant for life to be alive, when in truth he is dead, the contract is altogether void; the purchaser may resist its performance; and if it should have been completed by conveyance the conveyance may be set aside, and the purchase money may be recovered as money paid under a mistake of fact (*q*). The same law applies to the sale of an estate in remainder or reversion expectant on a life estate, if made on the basis that the tenant for life is living, when he is in fact dead; or to the sale of a reversion or remainder expectant on an estate tail, if actually barred at the time of sale, the parties supposing it to be still in existence (*r*). So it appears that if a contract be made for the sale of land or a house in the belief that the property is existing in its usual state, the agreement is void if at the time that it was made the land were washed away by the sea, or the house destroyed by fire (*s*). In such cases, however, the thing sold must have been utterly destroyed so as to have ceased to exist at the time of sale; mere deterioration in quality, though unknown to both parties, is not sufficient to avoid the contract, if there remain in existence something which answers to the description of the thing sold (*t*). For example, a contract for the sale of land would not be void if the land were, unknown to the contracting parties, temporarily flooded. And in the case of the sale of a house destroyed by fire, the validity of the contract would appear to depend on the question, whether the house were a principal object of the sale, or were merely accessory to the land sold. Thus the sale of a single house in a town seems to be void if the house were no longer in existence at the time of sale. But on the sale of a large estate, comprising several farms, the fact that some cottage or farm house or building was burnt down before the sale appears to amount to no more than a depreciation in quality and to be insufficient to render the contract altogether void on the ground of common mistake. A mere depreciation in quality, which was unknown to both parties at the time of sale, appears to be governed by the same law as

Depreciation in quality unknown to the contracting parties.

(*q*) See *Hitchcock* v. *Giddings*, 4 Price, 135; *Strickland* v. *Turner*, 7 Ex. 208; *Cochrane* v. *Willis*, L. R. 1 Ch. 58; *Scott* v. *Coulson*, 1903, 2 Ch. 249; also *Hood* v. *McKinnon*, 1909, 1 Ch. 476, stated above, p. 744, n. (*m*).

(*r*) *SS. CC.*; *Colyer* v. *Clay*, 7 Beav. 188.

(*s*) *Hitchcock* v. *Giddings*, 4 Price, 135, 141.

(*t*) See *Barr* v. *Gibson*, 3 M. & W. 390.

applies to the case of unknown latent defects (*u*). If, however, it were an essential condition of the sale that the thing sold possessed a certain quality or were in some particular state of fitness (*x*), then it seems that, in case of a depreciation in quality unknown to both parties at the time of sale, the contract would be void on account of their common error as to a fact which formed the basis of their contracting.

Common mistake as to private right.

For this purpose a mistake in a matter of private right, such as a man's title to some particular piece of land, stands on the footing of a mistake of fact. Thus if A. agree to sell Blackacre to B., both parties believing it to belong to A., and it turn out afterwards that the land really belonged to B., the contract is void, B. may resist its performance either at law or in equity, and if it have been completed, the conveyance may be set aside and the purchase money recovered (*y*).

§ 2.—*Of mistake in the expression of consent, and its rectification.*

Mistake in the expression of consent.

It has been already mentioned (*z*) that, besides mistake avoiding an apparent contract or conveyance on the ground of want of true consent, there may be mistake in the expression of a true consent; and that in this case the agreement may generally be rectified. We will now consider this subject.

Rectification of written instruments a matter of the exclusive jurisdiction of Courts of Equity.

The rectification of a written instrument (in which form, as we have seen, a contract for the sale of land is required to be made (*a*)), on the ground of its not expressing, by reason of fraud or mistake, the true intention of all parties thereto, is a matter depending entirely on the jurisdiction of Courts of Equity now vested in the Supreme Court of Judicature (*b*). And we will begin by reminding the reader that the exercise of

(*u*) Above, p. 755.
(*x*) See above, p. 753.
(*y*) *Bingham* v. *Bingham*, 1 Ves. sen. 126; *Broughton* v. *Hutt*, 3 De G. & J. 501; *Cooper* v. *Phibbs*, L. R. 2 H. L. 149; *Jones* v. *Clifford*, 3 Ch. D. 779; *Huddersfield Banking Co., Ld.* v. *Henry Lister & Son, Ld.*, 1895, 2 Ch. 273, 281; *Allcard* v. *Walker*, 1896, 2 Ch. 369; *Re Roberts*, 1905, 1 Ch. 704.
(*z*) Above, p. 740.
(*a*) Above, p. 3.
(*b*) *Ball* v. *Storie*, 1 Sim. & Stu. 210, 219; see Wms. Real Prop. 177, 23rd ed.

An exception to the rule that extrinsic evidence is not admissible to explain or vary written instruments

this jurisdiction forms an exception to the general rule applied equally in Courts of Law and Equity (*c*), that extrinsic evidence of the intention of the parties to a written instrument is not admissible to explain or vary the terms of the writing (*d*). In other words, the general principle is that the parties are not at liberty to prove by evidence outside the instrument that the intention expressed therein was not their intention; or more briefly, that they are bound by the words which they have used in the writing, no matter what they (the parties) *meant* (*e*). The result of this general principle is that some matters, which are really errors in the expression of consent, are dealt with by the Courts in the course of their construction or interpretation of written instruments which they are prayed to enforce. Thus the Court will correct all errors which are apparent on the face of any written instrument as a matter of the construction or interpretation of its terms and without admitting extrinsic evidence to explain them (*f*). So also where the terms of some agreement embodied in a written instrument are upon the face of it ambiguously or inexactly expressed, the Court will not, as a rule, admit extrinsic evidence of what the parties' intention was, but will gather their intention from the written instrument alone, and decide, on consideration of the words used therein, what interpretation shall be given to them, or whether they bear any meaning at all (*g*).

Correction of obvious errors.

(*c*) *Parteriche* v. *Powlet*, 2 Atk. 383, 384; *Rich* v. *Jackson*, 4 Bro. C. C. 514, 6 Ves. 334, n.; *Ball* v. *Storie*, 1 Sim. & Stu. 210, 218, 219; *Bradford* v. *Romney*, 30 Beav. 431.

(*d*) *Rutland's case*, 5 Rep. 26; *Preston* v. *Merceau*, 2 W. Bl. 1249; *Goss* v. *Nugent*, 5 B. & Ad. 58, 64, 65; *Adams* v. *Wordley*, 1 M. & W. 374; *Doe* d. *Norton* v. *Webster*, 12 A. & E. 442; *Barton* v. *Dawes*, 10 C. B. 261; *Abrey* v. *Crux*, L. R. 5 C. P. 37; *Evans* v. *Roe*, L. R. 7 C. P. 138; *Henderson* v. *Arthur*, 1907, 1 K. B. 10; *Reliance Marine Insurance Co.* v. *Duder*, 1913, 1 K. B. 265, 273; see above, pp. 601, 602, 623.

(*e*) *Doe* d. *Templeman* v. *Martin*, 4 B. & Ad. 771, 783, 786; *Doe* d. *Gwillim* v. *Gwillim*, 5 B. & Ad. 122, 129; *Rickman* v. *Carstairs*, ib. 651, 663; above, p. 742.

(*f*) *Coles* v. *Hulme*, 8 B. & C. 568; *Wilson* v. *Wilson*, 5 H. L. C. 40, 66, 67; Sug. V. & P. 171, note (1); *Re Daniel's Settlement*, 1 Ch. D. 375; *Greenwood* v. *Greenwood*, 5 Ch. D. 951; *Mourmand* v. *Le Clair*, 1903, 2 K. B. 216; *Re Dayrell*, 1904, 2 Ch. 496; *Re Alexander's Settlement*, 1910, 2 Ch. 225; Norton on Deeds, pp. 82 *sq.*; but see *Re Mears*, 1914, 1 Ch. 694, where the Court declined to fill up a gap in a will due to the omission of limitations.

(*g*) *Altham's case*, 8 Rep. 150b, 155; *Croome* v. *Lediard*, 2 My. & K. 251; *Saunderson* v. *Piper*, 5 Bing. N. C. 425; Norton on Deeds, p. 98; see also *Higginson* v. *Clowes*, 15 Ves. 516; *Clowes* v. *Higginson*, 1 V. & B. 524; Sug. V. & P. 161; *Marshall* v. *Berridge*, 19 Ch. D. 233.

Rectification may be obtained where a written instrument does not express the parties' real agreement.

Having thus adverted to the rule, to which rectification forms an exception, let us pass on to rectification itself. Courts of Equity have jurisdiction to rectify a written instrument purporting either to contain or to carry out an agreement between the parties thereto, if it be proved by clear evidence that the instrument as drawn does not embody or give effect to their real agreement (*h*). In order to make out a case for rectification, it must be shown that the parties have actually concluded an antecedent contract at variance in some respect with that expressed to be contained in or carried out by the written instrument, and that they intended to embody or give effect to that antecedent contract in or by the writing. In the first place, there must be an antecedent contract; no inconclusive negotiation or honourable understanding void at law is sufficient (*i*).

This is hardly the place to state in full the rules, with their exceptions, as to the admission of extrinsic evidence in interpretation of written instruments. The reader is referred to Stephen on Evidence, Arts. 90-92; Norton on Deeds, Chaps. VI., VIII.; Wigram on Wills; L. Q. R. xx. 245. But it may be pointed out that, whilst extrinsic evidence of external facts, *other than* the fact of what the parties actually intended, is admissible to elucidate descriptions, apparently capable of being reduced to certainty by such evidence, of persons or things mentioned in the writing, evidence of the actual intention of the parties is *only* admissible where it turns out, *after* attempting to elucidate a description of the above character by proof of *such* external facts, that the description is equally applicable to several objects. See above, p. 751; *Cheyney's case,* 5 Rep. 68; *Altham's case,* 8 Rep. 155; *Jones* v. *Newman,* 1 W. Bl. 60; *Miller* v. *Travers,* 8 Bing. 244, 248; *Doe* d. *Morgan* v. *Morgan,* 1 C. & M. 235; *Doe* d. *Gord* v. *Needs,* 2 M. & W. 129, 139, 140; *Doe* d. *Hiscocks* v. *Hiscocks,* 5 M. & W. 363, 368, 369; *Re Hubbuck,* 1905, P. 129; *Re Ray,* 1916, 1 Ch. 461, 465, 466; *Re Battie Wrightson,* 1920, 2 Ch. 330, 340; Norton on Deeds, p. 104. We may also mention here that the rule in question does not prohibit the proof by oral evidence of some stipulation collateral and additional to a written contract and not inconsistent with the terms expressed in the writing; *Lindley* v. *Lacey,* 17 C. B. N. S. 578; *Malpas* v. *London & South Western Ry. Co.,* L. R. 1 C. P. 336; *Morgan* v. *Griffith,* L. R. 6 Ex. 70; *Erskine* v. *Adeane,* L. R. 8 Ch. 756; *Lamare* v. *Dixon,* L. R. 6 H. L. 414; *Angell* v. *Duke,* L. R. 10 Q. B. 174; *De Lassalle* v. *Guildford,* 1901, 2 K. B. 215; *Frith* v. *Frith,* 1906, A. C. 254; *Re Taylor,* 1910, 1 K. B. 562, 572, 581.

(*h*) *Uvedale* v. *Halfpenny,* 2 P. W. 151; *Motteux* v. *London Assurance Co.,* 1 Atk. 545; *Henkle* v. *Royal Exchange Assurance Co.,* 1 Ves. sen. 317; *Baker* v. *Paine,* ib. 456; *Ball* v. *Storie,* 1 Sim. & Stu. 210; *Cowen* v. *Truefitt, Ltd.,* 1899, 2 Ch. 309; above, p. 605, n. (*k*). A document embodying a unilateral act in law may be rectified where it does not express the real intention of the party, or, if the circumstances require it, may be cancelled: see above, p. 744, n. (*m*); *Re Walton's Settlement,* 1922, 2 Ch. 509, where a deed poll revoking the trusts of a settlement was cancelled, since the solicitor in preparing it had taken a mistaken view of his client's legal position and had gone beyond his instructions.

Rectification of a document embodying unilateral act in law.

(*i*) *Mackenzie* v. *Coulson,* L. R. 8 Eq. 368.

Secondly, there must be a common intention of embodying or giving effect to that contract in or by the writing (*k*). That this is an essential condition of obtaining rectification appears from the fact that, if the parties agree to omit some term of their real contract from the written instrument, no rectification thereof can be obtained (*l*). It is likewise shown in the case of contracts required by the Statute of Frauds (*m*) to be put into writing. If the antecedent contract were one of these and there were a common intention to embody or give effect to all the terms of that contract in or by the writing, the writing may be rectified (*n*); and it is no defence to an action for rectification to plead that the antecedent contract was one which the Statute of Frauds (*o*) requires to be in writing, and that it was made by word of mouth only (*p*). For if made by word of mouth, the contract was not void, but only not enforceable (*q*); and if the parties really assented to such a contract and had also a common intention of reducing or giving effect to all the terms of that contract to or by writing, and this intention were frustrated owing to the omission or mis-statement by mistake of some material term of the contract, it would be giving countenance to fraud to allow the defendant to repel proof of the mistake under cover of the statute (*r*). If, however, the writing purport to *contain* the contract, but omit some material part thereof, and there were no common intention to put the whole contract into writing, the document cannot be rectified. If this were not so, the Statute of Frauds could never be enforced. But, as we

(*k*) See *Fowler* v. *Fowler,* 4 De G. & J. 250, 265.

(*l*) *Pitcairn* v. *Ogbourne,* 2 Ves. sen. 375; *Irnham* v. *Child,* 1 Bro. C. C. 92; *Portmore* v. *Morris,* 2 Bro. C. C. 219; *Townshend* v. *Stangroom,* 6 Ves. 328, 332, 333; *Vouillon* v. *States,* 25 L. J. Ch. 875.

(*m*) Stat. 29 Car. II. c. 3, s. 4; above, p. 3.

(*n*) *Mortimer* v. *Shortall,* 2 Dru. & War. 363, in which case a lease of land for life executed in pursuance of a parol agreement was rectified; *Cowen* v. *Truefitt, Ltd.,* 1899, 2 Ch. 309; *Craddock Bros., Ltd.* v. *Hunt,* 1922, 2 Ch. 809.

(*o*) Stat. 29 Car. II. c. 3, s. 4; above, p. 3.

(*p*) *Thomas* v. *Davis,* 1 Dick. 301, 303; *Johnson* v. *Bragge,* 1901, 1 Ch. 28, 36, 37.

(*q*) Above, p. 10.

(*r*) See *Pitcairn* v. *Ogbourne,* 2 Ves. sen. 375; *Pember* v. *Mathers,* 1 Bro. C. C. 52, 54; *Clarke* v. *Grant,* 14 Ves. 519, 524; Fry, Sp. Perf. §§ 567, 814, 3rd ed.; above, p. 11. It is submitted that the *dictum* to the contrary of Alderson, B., in *A.-G.* v. *Sitwell,* 1 Y. & C. Ex. 559, 583, takes no account of the earlier authorities cited in this and the preceding notes and is not good law.

have seen (*s*), a person charged upon such a contract evidenced by a written memorandum is at liberty to plead in defence that the memorandum is insufficient to satisfy the statute by reason of its not containing the parties' whole agreement; and it does not appear that this defence can be met by a claim for rectification, unless it can be shown that there was a common intention of signing a perfect memorandum and that the omitted terms were left out by mutual mistake. Thirdly, the antecedent contract and the common intention of embodying it or carrying it out by the writing must be proved by very clear evidence; for, as we have seen (*t*), the rule is that, when several persons have joined in embodying some legal agreement or act in writing, they are bound by the intention expressed in the writing; and the whole burthen of proof lies on the person who asserts that the writing does not express the parties' real intention (*u*). For this reason the Court attaches great weight to the denial by the party, against whom rectification is claimed, of any intention at variance with that expressed in the writing: though it does not allow such denial to be a bar to the relief claimed, if overcome by clear evidence to the contrary (*x*). And for this reason also, where it is shown that the instrument sought to be rectified was executed in pursuance of and actually carries out at all points a prior agreement in *writing*, extremely strong evidence is required to induce the Court to believe that a mistake has occurred in drawing up the subsequent instrument. In

(*s*) Above, pp. 4, 5, 8, 9.

(*t*) Above, p. 769.

(*u*) *Henkle* v. *Royal Exchange Assurance Co.*, 1 Ves. sen. 317, 319; *Townshend* v. *Stangroom*, 6 Ves. 328, 333; *Fowler* v. *Fowler*, 4 De G. & J. 250, 264; *Tucker* v. *Bennett*, 38 Ch. D. 1, 9.

(*x*) *Pitcairn* v. *Ogbourne*, 2 Ves. sen. 375, 379; *Townshend* v. *Stangroom*, 6 Ves. 328, 334; *Bloomer* v. *Spittle*, L. R. 13 Eq. 422, stated below, p. 781. It is submitted that there is no rule, as suggested by the *dicta* of Lord St. Leonards in *Mortimer* v. *Shortall*, 2 Dr. & War. 363, 374, and Alderson, B., in *A.-G.* v. *Sitwell*, 1 Y. & C. 559, 583 (accepted in Pollock on Contract, 556, 9th ed.), that if the alleged mistake be denied by one of the parties to the written instrument, parol evidence alone is inadmissible to prove it. Such a rule would obviously be an inducement to fraud; and the weight of authority is against Lord St. Leonards' *dictum*. Parol evidence was admitted and prevailed in face of the defendant's denial in *Pitcairn* v. *Ogbourne*, 2 Ves. sen. 375, 379; *Garrard* v. *Frankel*, 30 Beav. 445; and *Paget* v. *Marshall*, 28 Ch. D. 255. And Baron Alderson's true meaning appears to have been that the Statute of Frauds prohibits the admission of parol evidence to prove a case for rectification in the face of the defendant's denial. But, as we have seen, this proposition cannot be upheld; above, p. 771, nn. (*n*, *p*).

such circumstances it is obvious that there could have been no mistake in the subsequent instrument unless the parties had come to a new agreement after they had made the agreement in writing, or had made a mistake in the prior agreement in writing as well as in the instrument purporting to give effect to it. In the former case the plaintiff, who would scarcely be claiming rectification except to obtain the inclusion of some term in his own favour, is in this difficulty, that if the new term were gratuitously agreed to by the other party, there is for want of a consideration no *contract* between them to execute the subsequent instrument as alleged (*y*): though if there were a consideration for the new term, it appears on principle that he ought to be admitted to prove the contract so constituted. In the case of an alleged mistake, both in the antecedent agreement in writing and in the instrument giving effect to it, the plaintiff is in truth claiming the specific performance with a parol variation of the antecedent contract in writing; and in this case the authorities regarding his right to obtain relief are conflicting. These authorities it is now proposed to examine.

It has ever been held that one may claim rectification as plaintiff.

Now it has been clearly established from the earliest times of modern equitable jurisdiction that a man may well claim, as plaintiff, the rectification of a written instrument on the ground of a mistake common to all parties thereto in the terms of the writing, and may prove by extrinsic evidence that they entered into some antecedent contract at variance with the terms of the instrument and had a common intention of embodying or carrying out that contract in or by the writing (*z*). And it is, as we have seen (*a*), equally clear that the Statute of Frauds is no bar to obtaining such relief, notwithstanding that the antecedent contract were one of those required by that Act to be put into writing, but were made by word of mouth. It is also perfectly well settled that rectification will be granted in equity not only of written instruments in the nature of executed contracts, those which are meant to give effect to some antecedent agreement, but also of writings which are merely intended to embody an agreement of an executory nature (*b*). For example, a written

Rectification granted of instruments embodying executory as well as executed agreements.

(*y*) *Price* v. *Dyer*, 17 Ves. 356, 364; above, p. 770.
(*z*) Above, pp. 770 and n. (*h*), 771 and nn. (*n*, *p*).
(*a*) Above, p. 771.
(*b*) *Henkle* v. *Royal Exchange Assurance Co.*, 1 Ves. sen. 317; *Baker* v. *Paine*, ib. 456; *Hodgkinson* v. *Wyatt*, 9 Beav. 566; *Stedman* v. *Collett*, 17 Beav. 608.

Claim for rectification might be joined with claim for relief under the writing rectified.

contract to sell land may certainly be rectified just as well as a conveyance of land upon sale (*c*). Furthermore, it appears that under the old Chancery practice a claim for the rectification of a written instrument, which embodied an agreement of an executory nature, might well be joined with a claim for equitable relief in respect of the enforcement of the agreement (*d*). And under the rules of practice introduced by the Judicature Act of 1873 (*e*), the Supreme Court is required, in every cause pending before it, to grant all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause; so that, as far as possible, all matters in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided. Now it would appear to be a necessary consequence of these rules that a man may first apply as plaintiff for the rectification of a written contract for the sale of land, and may afterwards sue for the specific performance of that contract, as rectified; and further, that he may well combine these claims in one action (*f*). On this point, however, there has been a conflict of judicial authority. The reason of this is as follows:—

Rule that specific performance of a written contract with parol variation cannot be enforced by a plaintiff.

It was decided before the commencement of the Judicature Acts, that a man is not entitled to enforce, as plaintiff, the specific performance of a written agreement with a parol variation. This decision was placed on the ground of the general principle above stated (*g*) that, if one seek to enforce a written contract, he is bound by the words used in the writing in which it is expressed, and extrinsic evidence is not admissible to show that the parties' real intention is different from that expressed in the writing (*h*). It is true that in the principal cases so deciding no express claim for rectification of the agreement appears to have been made: but as the bill was for the specific

Rich v. *Jackson*; *Woollam* v. *Hearn*.

(*c*) *Olley* v. *Fisher*, 34 Ch. D. 367, 369; see also *Fife* v. *Clayton*, 13 Ves. 546.

(*d*) See the last three cases cited in note (*b*), above, p. 773.

(*e*) Stat. 36 & 37 Vict. c. 66, s. 24 (7).

(*f*) Fry, Sp. Perf. § 517, p. 227, 1st ed.; § 781, p. 346, 2nd ed.

(*g*) Above, p. 769.

(*h*) *Rich* v. *Jackson*, 4 Bro. C. C. 514, 6 Ves. 334, n.; *Woollam* v. *Hearn*, 7 Ves. 211, 218, 219; *Davies* v. *Fitton*, 2 Dru. & War. 225, 232; see also *Squire* v. *Campbell*, 1 My. & Cr. 459, 480; *Manser* v. *Back*, 6 Hare, 443, 447; *Thompson* v. *Hickman*, 1907, 1 Ch. 550, 561.

performance of a written agreement to grant a lease alleging a mistake in the amount of rent therein stated to be reserved and claiming to have a lease at the rent really agreed upon, it is obvious that rectification of the written agreement was incidentally or at least substantially claimed (*i*). Besides this, the same rule was applied by Lord St. Leonards in a case where rectification was claimed of a lease, which had been executed in strict accordance with an antecedent written agreement, on the ground of a common mistake in the lease and in the written agreement (*k*). A distinction was, however, taken with respect to the assertion of a parol variation of a written contract as a defence to proceedings for specific performance of the agreement (*l*). And it has been clearly established that a defendant to such proceedings may insist that the written contract does not contain the parties' real agreement, but that some stipulation made orally in his favour has by mistake or inadvertence been omitted from the writing, and that it would therefore be inequitable for the plaintiff to enforce against him the extraordinary remedy of specific performance, except on the terms of submitting to the parol variation. And the defendant may adduce extrinsic evidence in support of this contention (*m*). And the further distinction has been admitted, that if the parol variation be to one party's disadvantage, he may submit to it, even though he claim specific performance as plaintiff; for he is allowed to waive a right given to him by the written agreement, or to claim performance of that agreement as it stands, but with the addition of some extraneous act or promise which he offers to do or fulfil to his own detriment (*n*). It appears also that, if the parol variation be for the exclusive benefit of one of the parties, he may waive it, and may enforce as plaintiff the specific performance of the contract as set out in the written agreement (*o*).

Davies v. *Fitton.*

The defendant in specific performance may set up a parol variation.

Plaintiff may waive a parol variation to his own benefit.

(*i*) See *Rich* v. *Jackson,* 4 Bro. C. C. 514; *Woollam* v. *Hearn,* 7 Ves. 211.

(*k*) *Davies* v. *Fitton,* 2 Dru. & War. 225, 232.

(*l*) Above, p. 766 and n. (*k*). At law the defendant is bound by the writing and cannot allege any parol variation; above, pp. 769-771; *Powell* v. *Edmunds,* 12 East, 6; *Ford* v. *Yates,* 2 Man. & Gr. 549.

(*m*) *Joynes* v. *Statham,* 3 Atk. 388; *Ramsbottom* v. *Gosdon,* 1 V. & B. 165; *Winch* v. *Winchester,* ib. 375; *London and Birmingham Ry. Co.* v. *Winter,* Cr. & Ph. 57, 62; *Manser* v. *Back,* 6 Hare, 443; *Smith* v. *Wheatcroft,* 9 Ch. D. 223.

(*n*) *Martin* v. *Pycroft,* 2 De G., M. & G. 785; cf. *Preston* v. *Luck,* 27 Ch. D. 497.

(*o*) Younger, J., *North* v. *Loomes,* 1919, 1 Ch. 378, 385, 386; above, pp. 4, 5.

Rectification and specific performance in same action.

But although the decisions were precise which refused specific performance at the plaintiff's suit of a written contract with a parol variation, there were not wanting expressions of judicial opinion that it was equally inequitable to deny at the defendant's instance the specific performance of a written agreement with the addition of some stipulation to his detriment, which had by a common mistake been left out, as to enforce the same remedy against him without a term so omitted and enuring to his advantage (*p*). As we have seen (*q*), the general principles established in equity with respect to the rectification of written instruments appear to lead us to a conclusion exactly opposed to the rule in question. This view prevailed with the great American jurists, Mr. Justice Story and Chancellor Kent (*r*). And the same opinion was maintained by Sir Edward Fry (*s*), who also suggested that, since the enactment of the above-mentioned provision of the Judicature Act (*t*), the rule was no longer applicable. This suggestion was followed by North, J., in *Olley* v. *Fisher* (*u*), who considered that the plaintiff's claims for rectification of an agreement to grant a lease and for specific performance of the agreement as rectified might well be enforced where (as in the case before him) the Statute of Frauds was not pleaded (*x*). An agreement to sell land of course stands exactly on the same footing (*y*). The rule against granting specific performance with a parol variation at the plaintiff's suit was, however, followed by Farwell, J., in *May* v. *Platt* (*z*): but in that case neither *Olley* v. *Fisher* nor Sir Edward Fry's opinion was cited. And more recently the decisions in *Davies* v. *Fitton* (*a*) and *May* v. *Platt* were followed by Neville, J., who considered that he was bound by them, but declared that he had great difficulty in following the reasoning

Olley v. *Fisher.*

May v. *Platt.*

Thompson v. *Hickman.*

(*p*) See *Walker* v. *Walker*, 2 Atk. 98, 100; *Joynes* v. *Statham*, 3 Atk. 388, 389; *Pember* v. *Mathers*, 1 Bro. C. C. 52, 54; *Townshend* v. *Stangroom*, 6 Ves. 328, 339; Fry, Sp. Perf. 232 *sq.*, 1st ed.; 350 *sq.*, 2nd ed.

(*q*) Above, pp. 773, 774.

(*r*) 1 Story, Eq. Jur. § 161; *Gillespie* v. *Moon*, 2 John. Ch. N. Y. 585; *Keisselback* v. *Livingston*, 4 John. Ch. N. Y. 144.

(*s*) Specific Performance, pp. 227 *sq.*, 1st ed.; 346 *sq.*, 2nd ed.; §§ 811 *sq.*, 3rd and 4th ed.

(*t*) Above, p. 774.

(*u*) 34 Ch. D. 367. This case was followed by Kay, J., in *Shrewsbury and Talbot Cab Co.* v. *Shaw*, 89 L. T. News. p. 274.

(*x*) See above, p. 11.

(*y*) Above, p. 754, n. (*q*).

(*z*) 1900, 1 Ch. 616; see below, p. 782.

(*a*) Above, p. 775.

on which they appear to be based, and pointed out that to refuse relief to a plaintiff claiming specific performance with rectification of a written agreement is exactly contrary to the principles of equity on which the entire doctrine of rectification is founded (*b*). In this case again, neither *Olley* v. *Fisher* nor Sir Edward Fry's opinion was cited. Having regard to these omissions and to Mr. Justice Neville's pronouncement on the point of principle, it was submitted in the previous editions of this work (*c*) that the decision in *Olley* v. *Fisher* was to be preferred. This point has now been so decided in *Craddock Bros., Ltd.* v. *Hunt* by Mr. Justice P. O. Lawrence (*d*), and in the Court of Appeal (*e*). And it was further submitted that, if the decision in *Olley* v. *Fisher* be right, there is no reason for not extending it to a case where the Statute of Frauds *is* pleaded. For it is settled (*f*) that that statute can afford no defence to an action for rectification, if otherwise well founded. On this point also, Mr. Justice P. O. Lawrence was of the same opinion (*g*).

Craddock Bros., Ltd. v. *Hunt.*

Care must be taken to distinguish the cases in which a defendant to proceedings for specific performance effectually sets up a parol variation of the written agreement from those in which, though *pleading* the same defence, he *proves* no more than his own mistake and is really obliged to resist the plaintiff's claim on the ground of some misrepresentation or conduct contributing to his mistake, or of hardship (*h*). In the former case the defendant is really relying on a mistake common to both parties; he insists that their minds were in truth at one, but their real

Distinction where a parol variation is proved, and where the defendant's own mistake is alone proved.

(*b*) *Thompson* v. *Hickman,* 1907, 1 Ch. 550, 561, 562.
(*c*) Vol. II. pp. 707, 1st ed., 791, 2nd ed.
(*d*) 1922, 2 Ch. 809, where the learned judge held that he was not bound to follow *May* v. *Platt,* above, and rectified a mistake in a conveyance, although the conveyance conformed strictly to an antecedent written agreement, and the effect of ordering rectification was to grant specific performance of a written agreement with a parol variation. He concurred with the statement made by Neville, J., in *Thompson* v. *Hickman,* 1907, 1 Ch. 562, that to grant relief where the error has crept into one document and to refuse it where it is embodied in two, is inconsistent with equitable principle, for equity regards the substance rather than the form of the transaction. Moreover, since mistake, like fraud, is in equity an exception to the Statute of Frauds, that statute affords no defence so far as the rectification of the contract is concerned: 1922, 2 Ch. p. 822.
(*e*) 1923, W. N. 107, Sterndale, M. R., and Warrington, L. J., *diss.* Younger, L. J.
(*f*) Above, pp. 771, 773.
(*g*) See notes (*c*, *d*), above.
(*h*) Above, p. 765.

intention is not found in the writing. In the latter, his real defence is that the parties were not in truth agreed, though *at law* he is estopped from saying so, and he seeks to escape the application of the same rule of estoppel in equity also on the plea of misrepresentation or hardship (*i*). Hence it is that where a parol variation is pleaded as a defence to specific performance, the nature of the relief granted may vary according to the facts established by the evidence, and that it depends on the particular circumstances of each case whether the defence will merely defeat the plaintiff's claim, or whether the Court will order the performance of the contract according to the variation so set up (*j*). Thus if the alleged parol variation be plainly proved, so that the Court is satisfied that the agreement so varied was the parties' real agreement entered into with their true consent, it will not only reject the plaintiff's claim but will in the same action order, at the *defendant's* instance, the specific performance of the agreement as so varied (*k*). But as a rule the Court will not make an order in the same action upon the *plaintiff's* application for specific performance with the variation set up against him, unless he have by his pleading or (it seems) at the opening of the trial abandoned his claim to enforce the agreement as contained in the writing alone and submitted to perform it with the modification alleged. If the plaintiff maintain his own original contention to the end and fail to establish his claim, and the defendant do not ask for specific performance with the variation, then the Court will simply dismiss the plaintiff's action, but without prejudice, in general, to his suing for such specific performance in another action (*l*). It seems, however, that, if the defendant do not object, the Court may give the plaintiff the option of having his action dismissed or accepting an order for specific performance with the variation claimed (*m*). On the other hand, if the defendant do not establish by the extrinsic evidence admitted a true agreement between the parties as to some supplemental term omitted by mistake from the

Where a parol variation is pleaded in defence, the relief may vary according to the facts proved.

(*i*) See above, pp. 765, 766.

(*j*) *London & Birmingham Ry. Co.* v. *Winter,* Cr. & Ph. 57, 62.

(*k*) *Joynes* v. *Statham,* 3 Atk. 388; *Fife* v. *Clayton,* 13 Ves. 546.

(*l*) *Legal* v. *Miller,* 2 Ves. sen. 299; *Clowes* v. *Higginson,* 1 V. & B. 524, 534; *Lindsay* v. *Lynch,* 2 Sch. & Lef. 1; *Smith* v. *Wheatcroft,* 9 Ch. D. 223; *Marshall* v. *Berridge,* 19 Ch. D. 233; *Preston* v. *Luck,* 27 Ch. D. 497.

(*m*) See *Clarke* v. *Grant,* 14 Ves. 519; *Ramsbottom* v. *Gosdon,* 1 V. & B. 165.

writing, but merely show that *he* was under a mistake in making the written contract, and that the plaintiff's conduct contributed to this mistake or that it would be a hardship on him (the defendant) to have to perform the written contract, the Court will in general leave the plaintiff to his remedy at law, but may, it seems, give him the option of having his action dismissed or of having an order for specific performance of the contract as claimed to be varied by the defendant (*n*). And as we have seen (*o*), where the defendant has by mistake innocently made a misrepresentation to his own detriment in the written contract and fails to prove the plaintiff's real assent to a parol variation, the Court may give the plaintiff the option of rescinding the contract or of completing it according to the defendant's contention. If the defendant fail both to establish his claim, and to show any misleading conduct by the plaintiff or any hardship in his being obliged to perform the contract, the Court will order the specific performance of the written contract as prayed by the plaintiff (*p*).

To obtain rectification, there must be a *common* mistake.

It follows from the principles explained above (*q*) that, in order to obtain the rectification of a written instrument, a mistake common to all parties thereto must be proved. As we have seen (*r*), there must be an antecedent *contract;* this necessarily involves the true consent of all (*s*); and there must be a common intention of embodying that contract in or carrying it out by some writing (*t*). It follows that it is in general a good defence to a claim for rectification to prove that the written instrument carries out the *real* intention of the defendant and the intention *manifested* (*u*) by the plaintiff; in other words,

(*n*) See *Higginson* v. *Clowes,* 15 Ves. 516; *Gordon* v. *Hertford,* 2 Madd. 106; Fry, Sp. Perf. §§ 773 *sq.*, 3rd ed.; above, pp. 765, 766.
(*o*) Above, p. 679 and n. (*g*).
(*p*) Above, pp. 764 and n. (*c*), 765 and n. (*d*).
(*q*) Pp. 770 *sq.*
(*r*) Above, pp. 770, 773.
(*s*) Above, p. 741.
(*t*) Here it may be noted that, if several persons agree generally upon some act in the law to be embodied in a written instrument and one of them undertake to prepare the instrument on behalf of all, it is his duty to prepare what is in all respects a proper instrument, and if the instrument prepared fall short of this, but be executed by the others in the belief that it was an instrument proper to effect their intention, it may be rectified at their suit; *Corley* v. *Stafford,* 1 De G. & J. 228; *Clark* v. *Girdwood,* 7 Ch. D. 9; *Lovesy* v. *Smith,* 15 Ch. D. 655; cf. *Tucker* v. *Bennett,* 38 Ch. D. 1.
(*u*) Above, p. 742.

Cases where rectification with the alternative, at the defendant's option, of rescission, has been ordered on the ground of unilateral mistake.

Garrard v. *Frankel.*

that unilateral mistake, the error of the plaintiff alone, is not sufficient ground for rectification (*x*). There are certain cases, however, in which an exception to this rule has been admitted. Thus in *Garrard* v. *Frankel* (*y*), the parties signed a memorandum endorsed upon a draft lease and expressing that the plaintiff would let, and the defendant would take, the premises within described at the rent of 230*l.*, and upon the terms of the within lease. It appears that at that time the amount of the rent was left in blank in the draft lease. Afterwards the plaintiff filled up the blank, inserting the figures 130*l.* by mistake; and the lease was thus engrossed and executed, without the plaintiff's observing his error. On discovering the mistake he sued for rectification. The defendant strenuously contended that the rent of 130*l.* was the rent really agreed upon. Romilly, M. R., however, entirely declined to credit the defendant's evidence on this point; he found in effect that at the time of signing the memorandum both parties really intended the rent to be 230*l.*, and that the defendant was aware of the discrepancy between the lease and the agreement. But he treated the memorandum as if it had been signed after the figures 130*l.* had been inserted in the draft, and held that the case was one where the document which constitutes the whole agreement contains in itself contradictory statements as to the amount of rent. And he further considered that the defendant executed the lease, not fraudulently, but in the innocent belief that the plaintiff was gratuitously granting her (*z*) a lease at about half the rent which he had asked! In this state of affairs the learned judge cut the knot by deciding that he could neither permit the defendant to derive any advantage from the mistake, nor oblige her to accept a lease different from that which she supposed she was executing. He therefore gave her the option of accepting the lease with the rectification claimed or having it set aside altogether.

Harris v. *Pepperell.*

In *Harris* v. *Pepperell* (*a*), a memorandum was signed for the sale of "two houses in Teddington." The solicitor of the defendant (the purchaser) inquired what property was

(*x*) *Exeter* v. *Exeter,* 3 My. & Cr. 321; *Walsh* v. *Trevannion,* 16 Sim. 178; *Rooke* v. *Kensington,* 2 K. & J. 753, 763, 764; *Fowler* v. *Fowler,* 4 De G. & J. 250, 264, 265, 273; *Sells* v. *Sells,* 1 Dr. & Sm. 42; *Thompson* v. *Whitmore,* 1 J. & H. 268; *Bradford* v. *Romney,* 30 Beav. 431, 438; *May* v. *Platt,* 1900, 1 Ch. 616.

(*y*) 30 Beav. 445.

(*z*) The defendant was a lady.

(*a*) L. R. 5 Eq. 1.

comprised in the sale, and sent a plan showing what he supposed the defendant was buying. In reply, the vendor's solicitor sent a correct plan of what the vendor intended to convey: but the defendant's solicitor had the conveyance engrossed referring to a different plan, which comprised more, and sent the deed for execution without calling attention to the fact that he had not accepted the plaintiff's contention as to the parcels; and the vendor executed the conveyance without discovering the discrepancy. He afterwards sued for rectification of the conveyance. The defendant pleaded that *his* intention was carried out by the conveyance, and that the mistake of the plaintiff alone was no ground for rectification. Romilly, M. R., said that, as the Court will not enforce specific performance of a contract which one party has made under a mistake (*b*), so the Court may interfere where rectification is claimed on the ground of unilateral mistake, if the parties can be placed *in statu quo;* and on this ground he gave the defendant the option of accepting the rectification claimed or of annulling the contract. At the same time, he intimated pretty clearly that he thought that the defendant had behaved dishonestly. In *Bloomer* v. *Spittle* (*c*), the parties entered into an agreement in writing for sale of certain land, not excepting the mines thereunder, but the mines were excepted from the conveyance. Four years afterwards the purchaser sued for rectification on the ground of common mistake. The vendor by his answer denied the mistake, and alleged that the conveyance carried out the parties' real agreement. The vendor died before he could be cross-examined. Romilly, M. R., expressed the opinion that there had been a common mistake, and that the defence was not honest: but on account of the lapse of time since the execution of the conveyance, he gave the defendant's representatives the option of accepting the rectification claimed or of having the transaction set aside. In *Paget* v. *Marshall* (*d*), the plaintiff wrote to the defendant offering him the first and other upper

Bloomer v. *Spittle.*

Paget v. *Marshall.*

(*b*) It is submitted that this statement is far too wide, and in the face of the decision in *Tamplin* v. *James*, 15 Ch. D. 215, cannot now be upheld; see above, pp. 764, 765, and n. (*d*).

(*c*) L. R. 13 Eq. 427.

(*d*) 28 Ch. D. 255. This decision, as reported, was pronounced by Neville, J., to be wholly unintelligible; *Beale* v. *Kyte*, 1907, 1 Ch. 564, 565, in which case the judge also pointed out that the right rule is that, for the purpose of estimating any laches in applying for rectification, time begins to run from the date of the discovery of the mistake.

floors of three houses, which offer the defendant accepted in writing; and a lease was executed accordingly. Afterwards the lessor sued for rectification on the ground that it was not intended that the first floors should be comprised in the lease. Upon the evidence given, Bacon, V.-C., expressed a strong inclination to the opinion that the defendant had clear notice from the negotiations which led up to the plaintiff's letter that he had no intention of letting the first floors. But the learned judge hesitated to pronounce that the defendant's conduct was actually fraudulent, and so he followed Lord Romilly's decisions, declaring that because of the plaintiff's mistake, the defendant should be put to the election of accepting the rectification claimed or having the lease set aside (*e*).

Criticism of the above-mentioned cases.

These cases have met with adverse criticism. Thus the learned editors of Dart on Vendors and Purchasers remarked (*f*): "It is difficult to understand the ground of these decisions. Either there has been originally a contract, in which case the Court cannot make a new one, or there has been no contract, in which case neither at law nor in equity is there anything to enforce." And in *May* v. *Platt* (*g*), Farwell, J., expressed his concurrence in this comment, and delivered the further opinion that in the cases so criticised, the judges who decided them shrank from stigmatising the defendants' conduct as fraud, but treated it as equivalent to fraud, and that, in the absence of fraud, they would have had no jurisdiction to grant the relief they did. In *May* v. *Platt* (*h*), the defendant apparently agreed in writing to sell to the plaintiff certain leasehold land including by the defendant's mistake a plot which he had already parted with. A conveyance was executed in accordance with this agreement, the defendant assigning all the land described therein, including this plot, and entering into the statutory covenants for title. On discovery of the defendant's want of title, the plaintiff sued him for breach of these covenants. The defendant alleged common mistake and alternatively unilateral mistake and counterclaimed for rectification of the conveyance. His case was that

May v. *Platt*.

(*e*) It is very significant that in this case the defendant accepted the rectification.

(*f*) 2 Dart, V. & P. 839, 6th ed. This criticism does not occur in the 5th ed., vol. ii. 744; see vol. ii. p. 743, 7th ed.

(*g*) 1900, 1 Ch. 616, 618, 623.

(*h*) 1900, 1 Ch. 616.

the plaintiff had notice that he did not intend to sell the plot parted with. Farwell, J., gave judgment for the plaintiff both in his action and upon the counter-claim; he held that unilateral mistake was not sufficient to support a claim for rectification; and he rejected the evidence that the plaintiff had notice of the intention not to sell the plot, upon the ground that the defendant's counter-claim for rectification of a written instrument carrying out an antecedent contract in writing was equivalent to a claim made by a plaintiff for specific performance of that written contract with a parol variation, and that it was established by authority that such a claim could not prevail. As we have before pointed out (*i*), neither the criticism of Sir Edward Fry upon the rule so laid down, nor the case of *Olley* v. *Fisher* (*k*), was cited. And it is submitted that in this respect Mr. Justice Farwell's decision was wrong; though he was right to refuse rectification for unilateral mistake (*l*).

Analysis of the circumstances in which rectification may be claimed.

Thus the decisions are conflicting, and the law is in a most unsatisfactory condition. And it does not appear that the dilemma put by the editors of Dart and crowned with Mr. Justice Farwell's approval, that there must either be an antecedent contract or not, is sufficient to remove all difficulties. It seems that the evidence offered in support of a claim for rectification of a written instrument may disclose the existence of any one of the following states of things:—(1) An antecedent contract founded on the parties' real assent and at variance with the terms of the written instrument. In this case it is plain that the plaintiff has established his title to relief. (2) An antecedent contract, which the plaintiff alleges that he made by mistake, but which bound him by estoppel at law (*m*), followed by an instrument containing or carrying out such contract, the defendant contending that both the contract and the subsequent writing expressed his true intention. This was what occurred in the cases of *Paget* v. *Marshall* (*n*) and *May* v. *Platt* (*o*). Now the whole burthen of proof is on the plaintiff claiming rectification (*p*), and if in such circumstances he fail to prove that the contract and subsequent writing did not express the defendant's true intention, it is submitted that his claim

Common mistake.

Plaintiff mistaken, but estopped at law.

(*i*) Above, p. 776.
(*k*) 34 Ch. D. 367.
(*l*) Above, p. 776.
(*m*) See above, p. 742.
(*n*) 28 Ch. D. 255.
(*o*) 1900, 1 Ch. 616.
(*p*) Above, pp. 770-772.

for rectification ought to be rejected. He himself manifested an intention in accordance with that expressed and carried out. What equity then has he to be relieved against the writing binding him at law, if he cannot show that the defendant was equally in error? On the other hand, if the plaintiff can by extrinsic evidence prove a mistake common to both parties and occurring in the contract as well as the subsequent writing, it is questionable whether this evidence ought to be rejected. On principle, the better opinion seems to be that there is no objection to combining a claim for rectification of a written agreement with a claim for its specific performance (*q*). But on what ground can such an order as was made in *Paget* v. *Marshall* (*r*) be supported? If the Court gave any credence to the defendant's story, why should he have been put to the alternative of rectification or rescission? As to rectification, the plaintiff had not discharged the burthen of proof; and as to rescission, if the contract had not been completed, the plaintiff's mistake would have been no ground in equity for his obtaining the rescission of the contract (*s*), although it might have availed him, coupled with the plea of hardship, as a defence to specific performance (*t*). If on the other hand the Court believed in the truth of the plaintiff's allegations, why should he have had to submit to the chance of the defendant's electing for rescission? If there were fraud on the part of the defendant, the election should, it is submitted, have been offered to the plaintiff either to treat the contract as void or to hold the defendant to its performance with rectification (*u*). The truth is that in *Paget* v. *Marshall* (*x*), as in the cases which the judge there professed to follow (*y*), the Court attempted to give an equitable judgment on the hypothesis that both stories were true, the plaintiff's allegation of fraud equally with the defendant's assertion of innocence. (3) There may be disclosed an antecedent contract, into which the defendant alleges that he entered by mistake, but which would estop him from proving the mistake at law (*z*), followed by a written instrument embodying or carrying out

Defendant mistaken but estopped at law, and subsequent correction of the error.

(*q*) Above, pp. 773-776.
(*r*) 28 Ch. D. 255.
(*s*) Above, p. 763.
(*t*) Above, p. 765.
(*u*) See above, pp. 762, 763; below, p. 786.
(*y*) 28 Ch. D. 255.
(*y*) Above, pp. 780, 781.
(*z*) Above, pp. 742, 769.

what the defendant alleges to have been his real intention and the parties' true agreement. This is the case of *Bloomer* v. *Spittle* (*a*). Here again it seems that the whole burthen of proof is on the plaintiff; it does not appear to be really shifted by his production of the antecedent contract; he is still bound to show that the subsequent instrument is not in accordance with the real intention of all parties; and if the defendant give evidence in reply showing *primâ facie* that the parties abandoned the intention expressed in the antecedent contract as not being their real intention and determined to execute the subsequent instrument according to the terms therein contained, or even showing merely that the defendant entered into the antecedent contract by mistake and that the subsequent instrument expressed his own true intention and the plaintiff's manifested intention, then, it is submitted, the *onus* lies on the plaintiff of disproving this and showing that the true intention of all was that the subsequent instrument should accord with the antecedent contract (*b*). If he fail in this, he has not made good his claim to rectification; if he succeed, he has; and if the defence were dishonest, he ought to succeed. There seems to be no place for the alternative relief granted in *Bloomer* v. *Spittle* (*c*), except on the supposition that the plaintiff's claim was both adequately supported and insufficiently proved, and the defence at once dishonest and respectable. (4) There may be disclosed an apparent antecedent contract with regard to which there was no real assent of the parties and no estoppel from putting this in evidence. Such, it is submitted, were the cases of *Garrard* v. *Frankel* (*d*), as treated by Lord Romilly, and *Harris* v. *Pepperell* (*e*). If, as held by Lord Romilly, the memorandum of the antecedent agreement proved in *Garrard* v. *Frankel* were such that its statements as to the amount of the proposed rent were contradictory on the face of it (*f*), then the agreement was void for uncertainty; and in that case, if it were shown, as the Court found, that the lease executed carried out the defendant's intention and what she really and in good faith believed to be the plaintiff's intention, the plaintiff had failed to prove

No antecedent contract at all.

(*a*) L. R. 13 Eq. 427; above, p. 781.
(*b*) See above, pp. 771-773.
(*c*) L. R. 13 Eq. 427.
(*d*) 30 Beav. 445; above, p. 780.
(*e*) L. R. 5 Eq. 1; above, p. 780.
(*f*) Above, p. 780.

an antecedent agreement at variance with the terms of the lease, and his claim for rectification should have been rejected. Whilst if it were established that the defendant, knowing of the plaintiff's mistake as to the rent named in the lease, was minded wrongfully to take advantage of it, the option of rectification or rescission should have been given to him and not to her. In *Harris* v. *Pepperell,* it appears that the antecedent agreement in writing to buy "two houses at Teddington" was either void for uncertainty (*g*) or contained such a latent ambiguity as allowed of the admission of parol evidence to explain the parties' real intention (*h*). In the latter case, if the parties' minds were not at one as to the property sold, the contract was equally void (*i*). Consequently, the plaintiff could not substantiate his claim for rectification without disproving the truth of the defendant's assertion that the conveyance was in accordance with his intention. If the judge believed the defendant, he ought to have given judgment in his favour. If he considered that the defendant was wrongfully seeking to take advantage of the plaintiff's mistake, the option of rectification or rescission should have been the plaintiff's. (5) It may be shown that the defendant knew of the plaintiff's mistake, and yet accepted his offer according to the literal terms thereof, well knowing that the plaintiff would believe him to be accepting the offer which the plaintiff supposed that he had made and not that which he *had* made. Such a state of mind would certainly be fraudulent; the defendant would have been wrongfully attempting to take advantage of the other's mistake. The cases above mentioned (*j*), especially *Garrard* v. *Frankel* (*k*) and *Paget* v. *Marshall* (*l*), may all serve for examples of this state of things, if we assume that the fraudulent intention so strongly suspected by the Court did in truth exist. If, however, the defendant's fraud be proved, it is submitted that the plaintiff has established his claim for rectification. The defendant's fraudulent acceptance of his offer left two courses open to him. He might treat the contract as void for want of the parties' true consent; or he might hold the defendant to his acceptance of the offer according to the terms which he (the plaintiff) really intended to put, and which the defendant knew that he believed to be accepted (*m*). And

Fraud.

(*g*) Above, pp. 5, and n. (*u*), 780.
(*h*) Above, pp. 751, 769, n. (*g*).
(*i*) Above, p. 751.
(*j*) Above, pp. 780-782.
(*k*) 30 Beav. 445.
(*l*) 28 Ch. D. 255.
(*m*) Above, pp. 762, 763.

by suing for rectification the plaintiff has elected to affirm the contract.

Rectification of a conveyance cannot be had against a purchaser for value without notice.

The right to obtain rectification of a written instrument is a mere equity (*n*) and not an equitable interest (*o*). It is like the right to set aside a conveyance induced by fraud (*p*). If therefore the legal or equitable estate or interest in any property be assured to any one by a conveyance liable to be rectified on account of a common mistake, the right to rectification cannot be asserted as against a purchaser taking from or through some party to the unrectified conveyance for value (*q*), in good faith and without notice of the mistake (*r*). But as in the case of fraud (*s*), this doctrine applies only to purchasers claiming under conveyances and does not, as a rule, extend to assignees of the benefit of a contract; although a contract for the sale of land, which has been executed by payment of the whole purchase money, appears to stand, as regards the passing of the equitable estate in the land sold, upon the footing of a conveyance.

On sale of land, rectification may be obtained either before or after conveyance.

As we have seen (*t*), upon the sale of land, rectification may be obtained of an error common to both parties either in the written contract prior to completion or in the conveyance. And it is no bar to an action for rectification on this ground of a conveyance on sale that the contract has been completed (*u*). The case has no resemblance to that of a contract induced by an innocent misrepresentation but completed by actual conveyance according to the representation made (*x*). Thus, where by mutual mistake parcels have been omitted from the conveyance (*y*), or too much land has been conveyed by reference to

(*n*) Above, pp. 769 *sq.*
(*o*) See *Phillips* v. *Phillips*, 4 De G., F. & J. 208, 218; *Cave* v. *Cave*, 15 Ch. D. 639, 647.
(*p*) Above, p. 748.
(*q*) See above, p. 748, n. (*g*).
(*r*) *Thomas* v. *Davis*, Dick. 301, 304; *Blackie* v. *Clark*, 15 Beav. 595; *Garrard* v. *Frankel*, 30 Beav. 445.
(*s*) Above, p. 749.
(*t*) Above, pp. 605, 610, 623, 773, 774.
(*u*) See *Beaumont* v. *Bramley*, T. & R. 41, 52; and cases cited above, pp. 605, n. (*k*), 773, n. (*b*), 774, n. (*c*), and in notes (*y*), (*a*), (*b*), (*c*), below.
(*x*) Above, pp. 575, 613, 614, 683.
(*y*) *White* v. *White*, L. R. 15 Eq. 247.

a plan (*z*), or an easement intended to be granted has been incorrectly defined (*a*), or an exception or a reservation has been left out (*b*), or proper words of limitation have not been used (*c*), or the expressions importing the statutory covenants for title have not been put in or have not been restricted as they ought to have been (*d*), or any covenant not intended to be made has been inserted (*e*), the conveyance may be rectified; except to the prejudice of a purchaser for value claiming thereunder in good faith and without notice of the error (*f*). If in any of these cases the legal estate in any hereditaments failed, by reason of the error, to be assured as agreed, and an order of the Court for rectification of the conveyance be obtained, there is no need of any further express assurance of such legal estate; for it will pass by the effect of the order in the manner in which it is limited by the conveyance as so rectified (*g*).

(*z*) *Beale* v. *Kyte,* 1907, 1 Ch. 564.
(*a*) *Cowen* v. *Truefitt, Ld.,* 1899, 2 Ch. 309.
(*b*) *Exeter* v. *Exeter,* 3 My. & Cr. 321; *Moritmer* v. *Shortall,* 2 Dru. & War. 363; above, pp. 601, 602.
(*c*) *Re Bird's Trusts,* 3 Ch. D. 214; *Re Ethel and Mitchells and Butlers' Contract,* 1901, 1 Ch. 945, 948; *Re Tringham's Trusts,* 1904, 2 Ch. 487, 495; *Meeking* v. *Meeking,* 1917, 1 Ch. 77; above, p. 610.
(*d*) See above, pp. 605, 623.
(*e*) *Rob* v. *Butterwick,* 2 Price, 190.
(*f*) Above, p. 787.
(*g*) *White* v. *White,* L. R. 15 Eq. 247; *Hanley* v. *Pearson,* 13 Ch. D. 545; *Whiteley* v. *Delaney,* 1914, A. C. 132, 150.

CHAPTER XIV.

OF FRAUD, MISREPRESENTATION, DURESS AND UNDUE INFLUENCE.

§ 1. Of fraud and misrepresentation.
§ 2. Of duress and undue influence.

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§ 1.—*Of fraud and misrepresentation.*

Contract voidable for fraud or misrepresentation.

LIKE other contracts, a contract for the sale of land may be avoided by either party, if he were induced to enter into it by fraud or misrepresentation, that is to say, by a false representation made to him by the other party, either fraudulently or innocently. A representation is a statement made by one party to a proposed contract to the other, before or at the time of entering into the contract, with regard to some fact relating thereto (*a*). But in order that a false representation may give rise to a right to avoid a contract, it must have induced the party, to whom it was addressed, to enter into the contract; that is to say, that he would not have given his assent to the contract at all, but for his belief that the statement was true (*b*). A statement of this kind may be made either outside the contract or within it (*c*). Thus the vendor of a house may state orally to a purchaser about to sign a contract to buy it that the drains are in good order or the cellars dry (*d*), or he may make the same statement in the particulars of sale; and in either case the representation may induce the purchaser's consent to the sale (*e*).

Representation.

The representation must have induced the contract.

(*a*) *Behn* v. *Burness*, 3 B. & S. 751, 753.
(*b*) See *Flight* v. *Booth*, 1 Bing. N. C. 370, 377; *Attwood* v. *Small*, 6 Cl. & Fin. 232, 444; *Smith* v. *Kay*, 7 H. L. C. 750, 775, 776; *Smith* v. *Land and House Property Corp.*, 28 Ch. D. 7.
(*c*) *Behn* v. *Burness*, 3 B. & S. 751, 753, 754.
(*d*) Above, p. 759.
(*e*) See the cases cited at the end of note (*g*), p. 770, above, as to the admissibility of oral evidence in proof of a representation which has induced a written contract.

The present law as to the effect of misrepresentation, fraudulent or innocent, in giving to the party misled the right to avoid the contract is a compound of the principles of common law and equity. It seems necessary, therefore, in order to arrive at a right understanding of the subject, to explain how false representations inducing a contract were treated in courts of common law and equity before their jurisdictions were united in the High Court of Justice.

Fraudulent representation at common law.

At common law, if an untrue representation inducing a contract were made fraudulently, that is to say, either with the knowledge that it was untrue or in reckless ignorance whether it was true or false (*f*), the party so misled might at his election adopt one of two alternative courses. He might, where the parties could be restored to their former position, avoid the contract, not only pending its completion, but also after it had been completely performed (*g*), and sue for the recovery of any money paid or property conveyed thereunder, he on his part surrendering any benefit received thereby; or he might affirm the contract and bring an action of deceit to recover any damages caused by the fraudulent misstatement (*h*). And the common law allowed the like right of avoiding the contract, though not the same action of deceit, if a party to some contract of the class described as *uberrimæ fidei* (principally contracts of insurance) were induced to enter into it by a false representation made innocently or even by the non-disclosure of some material fact (*i*). But apart from fraud and except in the case of contracts *uberrimæ fidei*, a representation, at common law, could only affect a contract if it amounted to a warranty or *promise* of the truth of the fact stated and so formed a *part*

Innocent misrepresentation and even non-disclosure might avoid contracts *uberrimæ fidei*.

Effect of innocent misrepresentation at common law in the case of other contracts.

(*f*) *Behn* v. *Burness*, 3 B. & S. 751, 753; *Derry* v. *Peek*, 14 App. Cas. 337.

(*g*) See above, p. 614.

(*h*) *Deposit and General Life Assurance Co.* v. *Ayscough*, 6 E. & B. 761; *Oakes* v. *Turquand*, L. R. 2 H. L. 325; *Clough* v. *London & North Western Ry. Co.*, L. R. 7 Ex. 26; Benjamin on Sale, 336, 342, 359, 2nd ed.

(*i*) *Carter* v. *Boehm*, 3 Burr. 1905; *Morrison* v. *Universal Marine Insurance Co.*, L. R. 8 Ex. 197; *Ionides* v. *Pender*, L. R. 9 Q. B. 531; *London Assurance Co.* v. *Mansel*, 11 Ch. D. 363; *Rivaz* v. *Gerussi*, 6 Q. B. D. 222; *William Pickersgill & Sons, Ld.* v. *London and Provincial, &c. Insce. Co., Ltd.*, 1912, 3 K. B. 614, 621, 622 (defences of non-disclosure available against assignee of a marine policy); above, p. 757.

of the whole agreement entered into (*k*): otherwise it had no effect at all (*l*). If it did form part of the contract, it might either be an essential term thereof, going to the whole substance of the contract—that is to say, it might be a stipulation, on the performance of which the performance of the rest of the contract was conditional; or it might be a term independent of the parties' main agreement—that is to say, a stipulation, on the performance of which the performance of the rest of the contract was not dependent. In other words, the representation might be either a condition or a pure warranty (*m*); and this question was determined by the parties' intention to be gathered from all the circumstances of the case (*n*). In the former case the untruth of the representation amounted to such a breach of contract by the party, who made the statement, as discharged the other from the performance of his part of the agreement (*n*). In the latter case, the party misled was not justified in repudiating the contract if the statement proved untrue; he was obliged to perform the main agreement: but he was entitled to damages for the breach of warranty committed (*o*). And even in the former case, moreover, if the contract had been executed in favour of the party misled, so that he had received the consideration for his promise, he could not *then* refuse entirely to perform his part of the contract, unless the representation had amounted to *a special stipulation* that the contract should be void in case of its non-fulfilment (*p*); if not, he could only claim damages for breach of the warranty (*q*). It will thus be observed that in no case (apart from fraud and contracts *uberrimæ fidei*) was misrepresentation considered to affect the *formation* of the contract. The view was *not* taken that the parties only gave their consent, whereby they made a contract

(*k*) *Behn* v. *Burness*, 3 B. & S. 751, 753.

(*l*) *Hopkins* v. *Tanqueray*, 15 C. B. 130; *Kennedy* v. *Panama, &c. Mail Co.*, L. R. 2 Q. B. 580.

(*m*) Above, p. 753.

(*n*) *Flight* v. *Booth*, 1 Bing. N. C. 581; *Bannerman* v. *White*, 10 C. B. N. S. 844; *Behn* v. *Burness*, 3 B. & S. 751; *Heilbut, Symons & Co.* v. *Buckleton*, 1913, A. C. 30, 38, 50, questioning a *dictum* of A. L. Smith, M. R., in *De Lassalle* v. *Guildford*, 1901, 2 K. B. 215, at p. 221.

(*o*) *Heyworth* v. *Hutchinson*, L. R. 2 Q. B. 447, adopted as law in the Sale of Goods Act, 1893, stat. 56 & 57 Vict. c. 71, s. 53; see Benjamin on Sale, 448, 741, 748, 749, 2nd ed.; above, p. 32, n. (*b*).

(*p*) *Bannerman* v. *White*, 10 C. B. N. S. 844; *Behn* v. *Burness*, 3 B. & S. 751, 755, 756.

(*q*) *Street* v. *Blay*, 2 B. & Ad. 456.

with each other, *conditionally* upon the representation being true; and that the contract was therefore avoided if it were untrue. On the contrary, the contract was treated as having been fully formed; the untruth of the representation occasioned a breach of the entire contract or a part of it; and even where it was held that the contract might be avoided after its execution in favour of the party misled, it was considered that this result was effected, not by an annulment of the parties' consent, but by their *express agreement* that the contract should be so avoided (*r*).

The common law treatment of misrepresentation was a particular instance of its rules respecting the dependence of mutual stipulations.

Here it may be pointed out that, as the common law took no account of a representation made innocently except as a *stipulation* forming part of the contract, its treatment of a representation as a condition or a warranty according to the parties' intention was no more than a particular instance of the rules of law respecting the dependence or independence of mutual stipulations contained in a contract. At common law, if the obligation of one party to a contract be dependent on the fulfilment by the other either of his part of the contract or of some particular stipulation embodied therein, so that the *performance* of the latter party's duty under the contract or the particular stipulation is a condition precedent to his enforcing the obligation incumbent on the former, then a breach by the latter of his part of the contract or of the particular stipulation will discharge the former from his obligation under the agreement; and the former may, if he choose (*s*), rescind the contract and sue independently of the contract (under the old practice, in *assumpsit*) for the recovery of any money paid thereunder (*t*). But in order that the breach of some particular stipulation in a contract may discharge the party entitled to the benefit thereof from the performance of his part of the contract, the stipulation must go to the root of the whole consideration; its performance must be an essential condition of his incurring liability under the agreement (*u*). For example, we have seen that, upon a

(*r*) See last note but one.

(*s*) He has the option of rescinding the contract, or affirming it and suing *under the contract* for damages for its breach; *Michael* v. *Hart*, 1902, 1 K. B. 482.

(*t*) *Flight* v. *Booth*, 1 Bing. N. C. 370.

(*u*) *Duke of St. Albans* v. *Shore*, 1 H. Bl. 270; *Campbell* v. *Jones*, 6 T. R. 570; *Bettini* v. *Gye*, 1 Q. B. D. 183; *Mersey, &c. Co.* v. *Naylor*, 9 App. Cas. 434; *Cornwall* v. *Henson*, 1900, 2 Ch. 298, 303,

contract for the sale of land, the vendor's obligation to convey the land and the purchaser's obligation to pay the price are, as a rule, dependent on each other, and neither party can enforce the other's liability without performing or having offered to perform his own duty (*x*). So on a contract for the sale of land, the performance of the particular stipulation implied therein, that the vendor shall show a good title, is an essential condition of the purchaser's liability; and if this stipulation be broken, he may at once repudiate the contract and sue for the recovery of his deposit (*y*). Similarly, on an executory contract for the sale of goods with an undertaking that they shall be of a particular quality, compliance with this undertaking (*z*) is in general an essential condition of the sale, and the purchaser may, when the property has not yet passed to him under the contract, reject the goods on breach of the undertaking and altogether repudiate the agreement (*a*). But, although a man bound by a contract may refuse to perform his promise till the other party has complied with a condition precedent, yet, if he has received and accepted a substantial part of that which was to be performed in his favour, the condition precedent changes its character, and becomes a warranty in the strict sense of the word (*b*), that is, a collateral agreement independent of the rest of the contract; and non-compliance therewith will no longer afford a defence to an action to enforce his liability on the contract, but will only give rise to a counter-claim for damages (*c*). Thus, where specific goods are sold with an under-

304; *Ellinger* v. *Mutual Life Insurance Co. of New York,* 1905, 1 K. B. 31; *General Bill Posting Co.* v. *Atkinson,* 1909, A. C. 118; see 1 Wms. Saund. 320, n. (4); 2 id. 352, n. (3); 2 Smith, L. C., notes to *Cutter* v. *Powell.*

(*x*) Above, pp. 545, 546; *Glazebrook* v. *Woodrow,* 8 T. R. 366. See *Poole* v. *Hill,* 6 M. & W. 835; *Laird* v. *Pim,* 7 M. & W. 474.

(*y*) Above, pp. 32, n. (*b*), 152-157, 178.

(*z*) Such an undertaking is of course commonly called a warranty of quality: but we avoid using the word "warranty" in the text on account of the strict sense in which the word is used in the Sale of Goods Act, 1893; see next note.

(*a*) *Street* v. *Blay,* 2 B. & Ad. 456, 463; *Heilbutt* v. *Hickson,* L. R. 7 C. P. 438, 451; Benjamin on Sale, 748, 2nd ed.; see stat. 56 & 57 Vict. c. 71, ss. 11, 62, and note that in the Act the term *warranty* is confined to cases where it is not a condition. Cf. above, pp. 32, n. (*b*), 753.

(*b*) Above, p. 753.

(*c*) Benjamin on Sale, 452, 2nd ed.; *Ellen* v. *Topp,* 6 Ex. 424, 441; *Behn* v. *Burness,* 3 B. & S. 751, 755; and see *Bentsen* v. *Taylor,* 1893, 2 Q. B. 274.

taking that they shall be of a particular quality, the purchaser cannot return the goods after the property has passed to him, and he has so enjoyed the benefit of the contract: but if the goods be not of the quality promised, he is entitled to damages (*d*). In the same way, if one be induced to sign a contract for purchase of a house by the vendor's oral representation made untruly, but not fraudulently, that the drains are in good order, he may, if he discover the truth before completion, repudiate the contract at law and sue for the recovery of his deposit (*e*): but if he accept a conveyance before he become aware of the defect, he cannot then rescind the contract (*f*), though, if the parties' intention were that the representation should amount to a warranty, he may sue for damages for breach of the warranty so implied (*g*).

Equitable rules as to fraud or misrepresentation inducing contract.

Contract induced by fraud might be set aside in equity.

Let us now turn to the principles of equity. Courts of Equity enjoyed a concurrent jurisdiction with the Courts of Law in the matter of fraud, but had a further exclusive jurisdiction to compel the delivery up and cancellation of written instruments, which had been forged or procured to be executed by fraud, duress or undue influence (*h*). As regards the avoidance of a contract induced by a fraudulent representation, the rule of equity was the same as the rule of law; the contract was regarded as, not void, but voidable (*i*) at the option of the party defrauded. He might therefore plead the fraud as an absolute bar to proceedings against him for specific performance of the contract (*k*). But, further, he might sue in equity as plaintiff, either before completion of the contract, to have the agreement rescinded and any written instrument containing it delivered up to be cancelled; or after completion, so long as the parties could be restored to their former position, to have

(*d*) *Street* v. *Blay*, 2 B. & Ad. 456; Benjamin on Sale, 741, 744, 748, 753, 2nd ed.; stat. 56 & 57 Vict. c. 51, s. 11 (1 *c*).

(*e*) *Smith* v. *Land and House Property Corp.*, 28 Ch. D. 7.

(*f*) Above, pp. 576, 613, 614.

(*g*) *Re Lassalle* v. *Guildford*, 1901, 2 K. B. 215, as to which see above, p. 791 and n. (*n*), and *Heilbut, Symons & Co.* v. *Buckleton*, there cited.

(*h*) Wms. Real Prop, 175, n. (*e*), 23rd ed.; and cases cited below, p. 795, n. (*l*).

(*i*) *Oakes* v. *Turquand*, L. R. 2 H. L. 325; *Re Duncan*, 1899, 1 Ch. 387, 389, 390.

(*k*) *Clermont* v. *Tasburgh*, 1 J. & W. 112, 120.

the whole transaction set aside (*l*). Courts of Equity of course had no jurisdiction to entertain an action of damages for deceit (*m*): but they had jurisdiction to entertain a personal demand against any one, who had by a fraudulent representation induced another to act thereon to his detriment; they would in such case grant specific relief in the way of compelling the guilty party to make good his representation; and they might order him to recoup any definite pecuniary loss sustained by the party defrauded (*n*). A person induced by fraud to make a contract for the sale of land had therefore the like election in equity as he had at law; that is, he might either rescind the contract, or he might affirm it and claim to have the representation made good (*o*). But if he chose to affirm the contract, and his loss by the representation were not capable of adjustment by some definite specific relief, but could only be assessed at an uncertain sum of money, then he could only claim compensation in Courts of Equity pending the completion of the contract in proceedings brought either by or against him for its specific performance (*p*); for there was no original jurisdiction in equity to give damages except as ancillary to some specific relief. If in such case the defrauded party chose to complete the contract or did so before he detected the fraud, and still proposed to retain the benefit of the transaction and not to set it aside, he could not then recover in equity any mere unliquidated pecuniary compensation for the false representation, but could only sue therefor as damages in an action of deceit at law (*q*).

Innocent misrepresentation in equity.

With regard to innocent misrepresentation, it was early established in equity that if one were induced to enter into a contract

(*l*) *Edwards* v. *McLeay*, G. Coop. 308, 2 Swanst. 289; *Attwood* v. *Small*, 6 Cl. & Fin. 232, 330, 331, 338, 395, 444 *sq.*, 502; *Lovell* v. *Hicks*, 2 Y. & C. Ex. 46.

(*m*) *Arkwright* v. *Newbold*, 17 Ch. D. 301; *Smith* v. *Chadwick*, 9 App. Cas. 187, 193; *Derry* v. *Peek*, 14 App. Cas. 337, 360.

(*n*) *Evans* v. *Bicknell*, 6 Ves. 174, 183; *Burrowes* v. *Lock*, 10 Ves. 470, 475; *Hill* v. *Lane*, L. R. 11 Eq. 215; *Peek* v. *Gurney*, L. R. 6 H. L. 377, 390; *Low* v. *Bouverie*, 1891, 3 Ch. 82, 94, n., 107 *sq.*; and see *Nocton* v. *Ashburton*, 1914, A. C. 932.

(*o*) *Rawlins* v. *Wickham*, 3 De G. & J. 304, 314, 315, 321, 322.

(*p*) See above, pp. 678-680, as to the purchaser's right to specific performance with compensation. *A fortiori*, he has the like right where the representation was fraudulent.

(*q*) *Newham* v. *May*, 13 Price, 749; *Leuty* v. *Hillas*, 2 De G. & J. 110; *Joliffe* v. *Baker*, 11 Q. B. D. 255, 267; *Clayton* v. *Leech*, 41 Ch. D. 103; Sug. V. & P. 235, 251; 2 Dart, V. & P. 904, 6th ed.; 812, 7th ed.

by a false representation as to some material fact made honestly and not fraudulently, as by mistake or inadvertence, such misrepresentation was a good ground for resisting the specific performance of the contract. But it was at the same time asserted that a much greater degree of misrepresentation was necessary in order to justify the party misled in suing to rescind the contract (*r*); and it was long considered that to justify an order for rescission of the contract, even before its completion, the misrepresentation must be fraudulent, that is, made knowingly or recklessly (*s*). But this position was not maintained; and Courts of Equity afterwards held that, where one was induced to enter into a contract by a material misrepresentation, though made without fraud, the contract was voidable at his option, and he might sue to have it set aside and (if written) delivered up to be cancelled (*t*). It had, however, been decided, before the Courts of Equity had abandoned their former position with respect to rescission for innocent misrepresentation, that a contract for the sale of land would not be set aside on this ground, where there had been no fraud, after it had been completed by conveyance and payment of the purchase money (*u*).

No rescission for innocent misrepresentation after completion.

Difference in principle between the rules of common law and equity as to innocent misrepresentation.

The later rule so adopted in the Courts of Equity differed in principle from that applied in the Courts of Law; for the equitable rule treated innocent misrepresentation as a matter affecting the formation of a contract and invalidating the parties' consent in the manner accomplished at common law by fraud only with respect to ordinary contracts and without fraud in the

(*r*) *Cadman* v. *Horner*, 18 Ves. 10; *Savage* v. *Brocksopp*, ib. 335, 338; *Wilde* v. *Gibson*, 1 H. L. C. 605, 632, 633; *New Brunswick, &c. Co.* v. *Muggeridge*, 1 Dr. & Sm. 363, 383; *Lamare* v. *Dixon*, L. R. 6 H. L. 414; above, p. 759.

(*s*) *Attwood* v. *Small*, 6 Cl. & Fin. 232, 330, 338, 395, 444 *sq.*, 502; *Lovell* v. *Hicks*, 2 Y. & C. Ex. 46, 51; *Bartlett* v. *Salmon*, 6 De G., M. & G. 33; *Conybeare* v. *New Brunswick, &c. Co.*, 1 De G., F. & J. 578, 595; Sug. V. & P. 243, 244.

(*t*) *Pulsford* v. *Richards*, 17 Beav. 87, 95, 96; *Stanton* v. *Tattersall*, 1 Sm. & G. 529; *Aberaman Ironworks* v. *Wickens*, L. R. 4 Ch. 101; *Reese River Silver Mining Co.* v. *Smith*, L. R. 4 H. L. 64, 79, 80; *Torrance* v. *Bolton*, L. R. 8 Ch. 118.

(*u*) *Wilde* v. *Gibson*, 1 H. L. C. 605, 632, 633. It should be noted that this decision, though professedly founded on the principle that a Court of Equity will not rescind a contract for misrepresentation unless made *knowingly* (that is, fraudulently), accords with the rule of the common law, which allowed no rescission for innocent misrepresentation after the contract had been substantially performed; above, pp. 791-794; *Seddon* v. *North Eastern Salt Co.*, 1905, 1 Ch. 326.

case of contracts *uberrimæ fidei* alone (*x*). Practically, however, the difference was not great (*y*). To give rise to the right of rescission in equity, a false representation must have been a part of the transaction ending in the formation of the contract, and must have induced the consent of the party misled to the agreement (*z*). And in the same circumstances the representation would have been considered, at common law, to form part of the contract itself and to amount to a condition precedent to that party's liability under the contract; in which case he might, on breach of the condition, rescind the contract entirely (*a*). After the commencement of the Judicature Acts, the equitable rule in question became enforceable in all Divisions of the High Court of Justice; it has been followed and approved of by the highest authorities; and as a branch of the law of contract, it has prevailed over the rules of common law (*b*). Any contract therefore of whatever kind may now be rescinded by any party, who has been induced to enter into it by a material misrepresentation made to him without fraud by any other party thereto (*c*). And this right, if promptly asserted after the discovery of the untruth, will not be defeated by the fact that the contract has been partly performed (*d*), so long as the party misled has not received substantially the whole consideration due to him under the contract (*e*). But it has been held since the Judicature Acts, following the above-mentioned decision in equity to the same effect (*f*), that where a contract induced by misrepresentation, without fraud, has been entirely performed, so that the party misled has received the whole consideration due to him thereunder (as happens when a contract for the sale of land has been completed by conveyance and payment of the purchase

The law since the Judicature Acts.

(*x*) See above, pp. 790, 791.

(*y*) Bowen, L. J., *Newbigging* v. *Adam*, 34 Ch. D. 582, 592.

(*z*) See below, p. 803.

(*a*) Above, pp. 791-794.

(*b*) *Redgrave* v. *Hurd*, 20 Ch. D. 1, 12; *Smith* v. *Land and House Property Corp.*, 28 Ch. D. 7; *Newbigging* v. *Adam*, 34 Ch. D. 582; affirmed, nom. *Adam* v. *Newbigging*, 13 App. Cas. 308; *Derry* v. *Peek*, 14 App. Cas. 337, 347, 359; *Karberg's case*, 1892, 3 Ch. 1, 13; *Whittington* v. *Seale-Hayne*, 82 L. T. 49.

(*c*) Admitted and applied, *Re Hare and O'More's Contract*, 1901, 1 Ch. 93, 96; *Wauton* v. *Coppard*, 1899, 1 Ch. 92; above, p. 679, n. (*g*).

(*d*) See last note but one.

(*e*) See above, pp. 791, 793, 794, 796, n. (*u*).

(*f*) *Wilde* v. *Gibson*, 1 H. L. C. 605; above, pp. 795, 796, and n. (*u*).

money), he can no longer assert any right in equity to set the agreement aside (*g*). It has been decided, however, that in such case he may still sue at law for damages sustained by him in consequence of the false representation, if it amounted to a warranty (*h*). Otherwise he has no remedy, unless he can claim damages for a breach of some covenant for title (*i*). It has further been finally established since the Judicature Acts that, in order to give rise to an action of deceit or any other proceedings (*k*) for a fraudulent misrepresentation, the representation must have been made either *knowingly* (without belief in its truth) or *recklessly* (without caring whether it was true or false); and that if a representation inducing a contract were made honestly in the belief that it was true, it is not sufficient to support an action of deceit that the party making the misstatement had no reasonable grounds for this belief. In other words, a man making such a statement is under no obligation to take reasonable pains to ascertain that it is true (*l*).

To be fraudulent, a false representation must be made *knowingly* or *recklessly*.

No obligation to take pains to ascertain the truth.

What must be proved to give rise to the right to rescind a contract for misrepresentation.

In order to give rise to a right to rescind a contract for misrepresentation, whether innocent or fraudulent, it appears that the following facts must be established:—There must have been a false representation made as to some material fact by one party to the contract, or his agent, to the other, as a part of the transaction ending in the formation of the contract; and the other must have entered into the contract on the faith of that representation, not knowing that it was false and reasonably believing it to be

(*g*) Selborne, C., *Brownlie* v. *Campbell*, 5 App. Cas. 925, 937, referring the case of *Hart* v. *Swaine*, 7 Ch. D. 42, to the ground of fraudulent misrepresentation; *Joliffe* v. *Baker*, 11 Q. B. D. 255, 272; Cotton, L. J., *Soper* v. *Arnold*, 37 Ch. D. 96, 102; *Clayton* v. *Leech*, 41 Ch. D. 103; *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, 1899, 1 Ch. 392, 416, 423; Farwell, J., *May* v. *Platt*, 1900, 1 Ch. 616, 623; *Debenham* v. *Sawbridge*, 1901, 2 Ch. 98; *Seddon* v. *North Eastern Salt Co.*, 1905, 1 Ch. 326; *Angel* v. *Jay*, 1911, 1 K. B. 666 (acceptance of a lease induced by innocent misrepresentation; *Rutherford* v. *Acton-Adams*, 1915, A. C. 866; above, pp. 575, 613, 614.

(*h*) *De Lassalle* v. *Guildford*, 1901, 2 K. B. 215; above, p. 575.

(*i*) See last note but one.

(*k*) Above, pp. 790, 794, 795.

(*l*) *Derry* v. *Peek*, 14 App. Cas. 337; *Angus* v. *Clifford*, 1891, 2 Ch. 449; *Le Lievre* v. *Gould*, 1893, 1 Q. B. 491; *United Shoe, &c. Co.* v. *Brunet*, 1909, A. C. 330, 338. This law has been altered with respect to statements made by directors or promoters of companies in prospectuses inviting subscriptions for shares or debentures; stat. 53 & 54 Vict. c. 64.

true (*m*). Let us make a further analysis of this statement. First, falsity is essential; there is no cause of action if the representation be true (*n*). Secondly, there must be a *representation*, that is, a statement of fact (*o*), either in words or by conduct (as in the case of active concealment of a defect) (*p*). As has been already shown, mere silence is not sufficient to confer the right to rescind (*q*); except in the case of contracts *uberrimæ fidei*, which may be avoided for non-disclosure of a material fact (*r*). And there must be a definite assertion of some fact as distinguished from a mere expression of the party's opinion or belief as to some circumstance relating to the contract, or a vague affirmation of the excellence of the property to be sold (*s*). For example, a distinct statement by a vendor of land that limestone embedded therein is capable of producing lime of first-rate quality fit for the London market (*t*), or that a house erected thereon is not damp (*u*), or that the property is let to a most desirable tenant (*x*), amounts to a representation sufficient, if false, to avoid the contract (*x*). But the incorrect description of renewable leaseholds as nearly equal to freehold (*y*), or of a

1. Falsity essential.

2. There must be a representation.

(*m*) See Pollock on Contracts, 608 *sq.*, 9th ed.; *United Shoe, &c. Co.* v. *Brunet*, 1909, A. C. 330, 338; *Vatcher* v. *Paull*, 1915, A. C. 372, 383.

(*n*) See *Smith* v. *Chadwick*, 20 Ch. D. 27, 9 App. Cas. 187; *Bellairs* v. *Tucker*, 13 Q. B. D. 562.

(*o*) Above, p. 759.

(*p*) Above, p. 759.

(*q*) Above, pp. 756, 757.

(*r*) Above, pp. 758, 790.

(*s*) *Fenton* v. *Browne*, 14 Ves. 144; *Trower* v. *Newcome*, 3 Mer. 704; *Scott* v. *Hanson*, 1 Sim. 13, 15; *Power* v. *Barham*, 4 A. & E. 473; Benjamin on Sale, 500, 2nd ed.; *Bellairs* v. *Tucker*, 13 Q. B. D. 562.

(*t*) *Higgins* v. *Samels*, 2 J. & H. 460. The actual decision was that the statement was a misrepresentation sufficient to bar the vendor from enforcing specific performance. The question whether the misrepresentation was sufficient to avoid the contract was not decided: though it was referred to as a difficult point. But at that time the equitable jurisdiction to rescind a contract for innocent misrepresentation was barely established; see above, p. 796. There can be no doubt at the present time that such a misrepresentation would be sufficient to avoid the contract.

(*u*) *Strangways* v. *Bishop*, 29 L. T. O. S. 120.

(*x*) *Smith* v. *Land and House Property Corp.*, 28 Ch. D. 7; and see *Tibbatts* v. *Boulter*, 73 L. T. 534, where the representation was that certain licensed property was subject to mortgages for particular sums, and that the mortgagees were willing to allow these amounts to remain on the security; cases cited above, p. 759, nn. (*n*), (*o*), (*p*), (*q*), (*r*), (*s*), (*t*).

(*y*) *Fenton* v. *Browne*, 14 Ves. 144.

small house as a desirable residence for a family of distinction (*z*), has been held not to amount to a representation affecting the contract (*a*). With regard to statements, which are ambiguous, being true if accepted in one sense, but false if taken in another, it must be shown, in order to found a right to rescission upon them, that the party, to whom they were made, understood them in the sense in which they were untrue (*b*). And it may be observed that a collateral promise to do some act, though it may effectively induce the promisee to enter into a contract (*c*), is not, properly speaking, a representation at all (*d*). Thirdly, the false representation must be of some fact (*e*) and not, it

Ambiguous statements.

Promise not properly a representation.

3. The representation must be of some fact.

(*z*) *Magennis* v. *Fallon*, 2 Moll. 561, 587.
(*a*) See also above, p. 760.
(*b*) *Smith* v. *Chadwick*, 9 App. Cas. 187.
(*c*) See cases cited at the end of note (*g*) to p. 770, above.
(*d*) *Expte. Burrell*, 1 Ch. D. 537, 552. See next note.

Representation of intention, whether a representation of fact.

(*e*) It has been held that a representation made by a party to a proposed contract of his intention to do some act, but not amounting to a promise to do the act, may, if unfulfilled, be a ground for resisting the specific performance of the contract; *Myers* v. *Watson*, 1 Sim. N. S. 523: *S. C.*, nom. *Rose* v. *Watson*, 10 H. L. C. 671, 681, 682; *Lamare* v. *Dixon*, L. R. 6 H. L. 414, 428; or even for avoiding the contract; *Traill* v. *Baring*, 4 De G., J. & S. 318. These decisions appear inconsistent with the law laid down in *Jorden* v. *Money*, 5 H. L. C. 185; *Maddison* v. *Alderson*, 8 App. Cas. 467, 473; and they are criticised in Pollock on Contract, 569, 761-764, 9th ed.; see also Atkinson, L. A., *Cavalier* v. *Pope*, 1906, A. C. 428, 432. It certainly appears that in those cases it would have been more consistent with principle to treat the representation according to the common law doctrine as a collateral promise. And indeed it was stated by Lord Westbury in *Rose* v. *Watson*, 10 H. L. C. 681, 682, that the representation was regarded in equity as a substantial part of the contract. But it has been held that a false statement as to a man's intention may be a representation of fact, since it is a representation as to the state of his mind, and may at least give rise to liability if made fraudulently. Thus it is considered that if a man contract to buy goods with the *intention* of not paying for them, that is a fraud sufficient to justify the avoidance of the contract on the vendor's part; *Load* v. *Green*, 15 M. & W. 216; *Clough* v. *London & North Western Ry. Co.*, L. R. 7 Ex. 26; *Expte. Whittaker*, L. R. 10 Ch. 446, 449; *Re Eastgate*, 1905, 1 K. B. 465. And it has been decided that a false statement made knowingly (that is, fraudulently) by the directors of a company inviting subscription to debentures, that *it was intended* to apply the money so borrowed to a particular purpose, was a statement of fact and a good cause of action of deceit against them; *Edgington* v. *Fitzmaurice*, 29 Ch. D. 459. As to a false statement of a person's motive in agreeing to buy or sell at a particular price, see *Vernon* v. *Keys*, 12 East, 632, 4 Taunt. 488, criticised in Benjamin on Sale, 356-358, 2nd ed., and Pollock on Contract, 610, 611, 9th ed.; *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221, 243. Statement of belief that some event will happen in the future must of course be carefully distinguished from statement that some event has happened in the past; *Bellairs* v. *Tucker*, 13 Q. B. D. 562. By stat. 6 Edw. VII. c. 41, s. 20 (3, 5), an untrue representation as to a matter of expectation

appears, of law (*f*). But for this purpose any representation as to a matter of private right is a representation of fact; such as a statement that one is the owner of some property which he offers for sale, or is invested with some power or authority under the particular constitution of some corporation or company or by virtue of some private Act of Parliament (*g*), or that the property is free from restrictive covenants (*h*). And it seems that misrepresentation as to some proposition of general law may give rise to a right of action, if made in deliberate fraud (*i*). Fourthly, the representation must be of some material fact, having relation to the proposed contract (*k*). But if the fact asserted relate to the contract and did actually induce the party, to whom the statement was made, to enter into the contract (*l*), it is a material fact (*m*); unless the circumstance alleged were such that no reasonable person would allow his judgment to be influenced by the statement (*n*). Fifthly, the representation must be made by some party to the contract or his agent; not by a third person (*o*). For the purposes of the rescission of the contract before completion, a false representation made by the party's authorised agent within the scope of his general autho-

4. The fact must be material.

5. The representation must be made by a party to the contract, or his agent.

False representation by agent.

or belief may avoid a contract of marine insurance. Such a contract is, however, *uberrimæ fidei;* see sects. 17-19; above, p. 790, and n. (*i*).

(*f*) *Lewis* v. *Jones,* 4 B. & C. 506, 512 (cf. above, p. 748); *Rashdall* v. *Ford,* L. R. 2 Eq. 750; *Beattie* v. *Ebury,* L. R. 7 Ch. 777, 800, 7 H. L. 102, 130; *Eaglesfield* v. *Londonderry,* 4 Ch. D. 693, 709; *Halbot* v. *Lens,* 1901, 1 Ch. 344, 350; *Harse* v. *Pearl, &c. Co.,* 1904, 1 K. B. 558.

(*g*) Above, p. 614; *Cripps* v. *Reade,* 6 T. R. 606, stated below, Chap. XIX. § 5; and see *Hume* v. *Pocock,* L. R. 1 Ch. 379, 385, where the contract was held to be for the purchase of such interest as the vendor had (see above, p. 187); *Richardson* v. *Williamson,* L. R. 6 Q. B. 276; *Mostyn* v. *West Mostyn Coal and Iron Co., Ld.,* 1 C. P. D. 145; *West London Commercial Bank* v. *Kitson,* 13 Q. B. D. 360; and consider *Kettlewell* v. *Refuge Assurance Co.,* 1908, 1 K. B. 545, affirmed, 1909, A. C. 243; cf. above, p. 768.

(*h*) Above, pp. 181, 182, 681.

(*i*) *Hirschfield* v. *London, Brighton, &c. Ry. Co.,* 2 Q. B. D. 1, 5, 6; Bowen, L. J., *West London Commercial Bank* v. *Kitson,* 13 Q. B. D. 360, 362, 363.

(*k*) Above, pp. 797, 799.

(*l*) See above, p. 789.

(*m*) See *Smith* v. *Kay,* 7 H. L. C. 750, 759, 769, 770, 775; *Smith* v. *Land and House Property Corp.,* 28 Ch. D. 7; *Gordon* v. *Street,* 1899, 2 Q. B. 641, 646.

(*n*) See *Magennis* v. *Fallon,* 2 Moll. 561, 587; *Scott* v. *Hanson,* 1 Sim. 13, in which case however it is doubtful whether the law laid down was correctly applied to the particular facts. Under the present law of misrepresentation (above, pp. 797, 798) the decision would scarcely be the same.

(*o*) *Lurgan's case,* 1902, 1 Ch. 707.

rity has exactly the same effect as if it were made by the principal himself; it is immaterial whether the principal did or did not give any express authority for the statement to be made, and whether it was made fraudulently or innocently (*p*). And it is within the general authority of an agent employed to sell or to find a purchaser for any property to make statements as to its quality (*q*) or otherwise as to matters affecting its value (*r*). If, however, it be sought on the ground of misrepresentation to rescind a contract for the sale of land after completion, it appears that, as this relief is then only granted on account of a fraudulent misrepresentation (*s*), the plaintiff must establish a false representation made by the agent in such circumstances as to give rise to a good cause of action of deceit against the principal (*t*). Sixthly, in order to give rise to the right to

(*p*) Abinger, C. B., *Cornfoot* v. *Fowke,* 6 M. & W. 358, 380 *sq.; Western Bank of Scotland* v. *Addie,* L. R. 1 Sc. 145, 158; Benjamin on Sale, 371, 375, 2nd ed.; *Mullens* v. *Miller,* 22 Ch. D. 194; *Smith* v. *Land and House Property Corpn.,* 28 Ch. D. 7, 13; *Wauton* v. *Coppard,* 1899, 1 Ch. 92; *Cree* v. *Stone,* Times Newspaper, 10th May, 1907.

(*q*) See above, pp. 759, 799.

(*r*) See previous note.

(*s*) Above, p. 797.

(*t*) *Wilde* v. *Gibson,* 1 H. L. C. 605, 616, 617, 633, 634; *Brownlie* v. *Campbell,* 5 App. Cas. 925, 937, 938; see below, pp. 805, 806. It is submitted that the decision of Rolfe, Alderson, and Parke, BB., in *Cornfoot* v. *Fowke,* 6 M. & W. 358, is good law if confined to the point that, where it is necessary to prove a *fraudulent* misrepresentation as a ground for rescinding a contract, and the misrepresentation was in fact made innocently by an agent and not *expressly* authorised by the principal, conduct actually fraudulent on the part of the principal must be shown. In that case the defendant, wishing to take a short lease of a furnished house, asked an agent employed to let it for the plaintiff, if there were anything objectionable about the house. The agent answered, "Nothing whatever"; he honestly believed this to be true. The house was in fact next door to a brothel; but the agent did not know this. The plaintiff knew it, but had not expressly authorised the agent to make the statement. The defendant found out the untruth of the statement on the day after he had signed an agreement to take the house for two years, and immediately repudiated the agreement and declined to take possession. The plaintiff afterwards sued for the rent due under the agreement; and the defendant pleaded that he was induced to enter into the agreement by the fraud of the plaintiff and others in collusion with him. It was held, that to support this plea, it was not enough to show that the plaintiff's agent innocently made a false representation, which the plaintiff knew to be untrue, but did not expressly authorise: but the defendant must show that the plaintiff himself had acted fraudulently; see as to this, *S. Pearson & Son, Ld.* v. *Dublin Corporation,* 1907, A. C. 351, 357, in which case the representation made was actually fraudulent on the part of the agent who made it. Substantially, however, the facts alleged in *Cornfoot* v. *Fowke* appear to have been sufficient to give the defendant a right to relief under the common

Cornfoot v. *Fowke.*

rescind the contract, the representation must have been made as a part of the transaction ending in the formation of the contract. It must not have been a statement made independently of the negotiation preliminary to the contract (*u*). Seventhly, the representation must have actually induced the party misled to make the contract; it must have been an effective cause of his entering into the agreement (*x*). If he did not act in reliance on the statement made, but used his own judgment, there is no ground for rescinding the contract (*y*), or for maintaining an action of deceit where the misrepresentation was fraudulent (*z*). So it has been held, in a case where active concealment of a defect was alleged as a fraud justifying the rescission of a

6. The representation must be a part of the transaction ending with the formation of the contract.

7. The representation must have induced the contract.

law as to innocent misrepresentation. That is to say, that, if he had relied on the agent's representation as forming a part of the contract, he might have established the right to rescind it before it had been executed in his favour (and apparently it had not been so executed, since he had not taken possession; see *Mostyn* v. *West Mostyn Coal and Iron Co.*, 1 C. P. D. 145); or if the agreement had been so performed he might have recovered damages for breach of warranty that the representation was true; see 6 M. & W. 369, 372, 373; *National Exchange Co.* v. *Drew*, 2 Macq. 103, 108, 109, 145; Willes, J., *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259, 262; above, pp. 791, 793, 794. Under the present law of rescission for innocent misrepresentation, it can scarcely be doubted that a party to a contract for the sale of land would be entitled, if misled in the same circumstances as the defendant in *Cornfoot* v. *Fowke*, to rescind the contract before completion: but if he were to claim rescission after completion, it appears that the decision in that case would still be in point. It is thought however that he might, after completion, recover damages for breach of the warranty implied by the representation; *De Lassalle* v. *Guildford*, 1901, 2 K. B. 215, as to which, see above, pp. 791, n. (*n*), 794.

(*u*) See *Hopkins* v. *Tanqueray*, 15 C. B. 130; *Way* v. *Hearn*, 13 C. B. N. S. 292; *Peek* v. *Gurney*, L. R. 6 H. L. 377; and cf. above, p. 797.

(*x*) Above, p. 789, and n. (*b*); and see *Smith* v. *Chadwick*, 9 App. Cas. 187, 196; *Nash* v. *Calthorpe*, 1905, 2 Ch. 237, 247; *Macleay* v. *Tait*, 1906, A. C. 24, 26, 31. A misrepresentation as to one lot will justify a purchaser of that lot and another lot in rescinding the purchase as to both when to the knowledge of both parties the contracts for the sale and purchase of the two lots—which ordinarily are to be treated as two separate contracts, above, p. 78—are in fact interdependent: *Dykes* v. *Blake*, 4 Bing. N. C. 463, 477; *Holliday* v. *Lockwood*, 1917, 2 Ch. 47, 53; see Sugd. V. & P. 320; *Casamajor* v. *Strode*, 2 My. & K. 706, 730. But though this interdependence is not established, the vendor will be refused specific performance as to the lot with respect to which there was no misrepresentation, if, apart from the misrepresentation, the purchaser would not have bought either lot: *Holliday* v. *Lockwood*, 1917, 2 Ch. 47, 56, 57.

(*y*) *Jennings* v. *Broughton*, 17 Beav. 234, 238, 239, 5 De G., M. & G. 126, 138.

(*z*) *Smith* v. *Chadwick*, 9 App. Cas. 187, 195, 196; *Nash* v. *Calthorpe*, 1905, 2 Ch. 237.

contract, that a purchaser who had made no inspection of the defective article before buying it, *did not act upon* any implied representation of its soundness, and so could not avoid the agreement (*a*). But if any artifice were used to conceal a defect prior to the sale of land, it is thought that the vendor could not enforce the specific performance of the contract, although the purchaser had not inspected the property (*b*). Where a person has acted on the faith of a false representation made to him, it is no defence to any proceedings founded thereon that he might have found out the truth if he had made inquiry (*c*). Lastly, the party to whom the representation was made must not have known that it was false; he must reasonably have believed it to be true. We have seen that he has no cause of action if he were aware of the true facts of the case (*d*).

8. The party claiming to have been misled must not have known that the statement was false.

What is requisite to maintain an action of deceit for a false representation inducing a contract.

To maintain an action of deceit for a false representation, which has induced one to enter into a contract, the same conditions are in general necessary as are required to confer the right to rescind the contract (*e*); and in addition to these, it must be shown that the false statement was made, either knowingly, that is, without belief in its truth, or recklessly, that is, without caring whether it were true or false (*f*); and it must be proved that the party misled has suffered damage by acting on the misrepresentation (*g*). Where these conditions are fulfilled, it is not necessary to prove that the false statement was made with the actual intention of defrauding, cheating or wrongfully gaining some advantage over the party so deceived; for if the statement were made knowingly or recklessly, a

Motive, as a rule, immaterial.

(*a*) *Horsfall* v. *Thomas,* 1 H. & C. 90; see above, p. 759, n. (*z*), as to this case.

(*b*) See above, p. 759.

(*c*) *Dyer* v. *Hargrave,* 10 Ves. 505, 509, 510; *Dobell* v. *Stevens,* 3 B. & C. 623; *Reynell* v. *Sprye,* 1 De G., M. & G. 660, 710; *Price* v. *Macaulay,* 2 De G., M. & G. 339, 346; *Central Ry. Co. of Venezuela* v. *Kisch,* L. R. 2 H. L. 99, 120; *Redgrave* v. *Hurd,* 20 Ch. D. 1.

(*d*) Above, p. 759. But the knowledge of an agent, not acquired in the course of his employment, will not be imputed to the principal: *Wells* v. *Smith,* 1914, 3 K. B. 722.

(*e*) Above, pp. 799 *sq.*

(*f*) Above, pp. 790, 798.

(*g*) Fraud without damage is no cause of action; Croke, J., *Bailey* v. *Merrell,* 3 Bulst. 94, 95; Buller, J., *Pasley* v. *Freeman,* 3 T. R. 51, 56; Benjamin on Sale, 338, 2nd ed.; Blackburn, L. A., *Smith* v. *Chadwick,* 9 App. Cas. 187, 195; *Macleay* v. *Tait,* 1906, A. C. 24, 26, 31.

fraudulent intention will be inferred (*h*). So also where an action of deceit is founded, not on a false statement in words, but on a fraudulent representation made by conduct (as in the case of active concealment of a defect (*i*)), it appears that an intention to defraud or cheat the party misled is of the gist of the action, but such intention may be inferred from the facts of the case (*k*). A principal is liable in an action of deceit for a false representation made by his agent, if it were untrue or reckless to the knowledge of the *principal* and were *expressly* authorised by him (*l*); or if it were untrue or reckless to the knowledge of the *agent* (though not of the principal) and were made either with the principal's express authority or without such authority within the scope of the agent's employment (*m*). But if the principal were aware of the untruth or recklessness of the statement, and the agent were not, and the representation were made by the agent, without fraud and in the honest belief that it was true, and without the *express* authority of the principal but within the scope of the agent's employment, it appears that, in order to charge the principal in an action of deceit (*n*), the party misled must prove some conduct positively fraudulent on the part of the principal; as for instance, that the principal, being aware of the agent's ignorance of the true state of the facts, purposely employed him to transact the business with

Principal, when liable in an action of deceit for a false representation made by his agent.

(*h*) *Polhill* v. *Walter*, 3 B. & Ad. 114, 123; *Wilde* v. *Gibson*, 1 H. L. C. 605, 633; *Peek* v. *Gurney*, L. R. 6 H. L. 377, 409; *Smith* v. *Chadwick*, 9 App. Cas. 187, 201; *Derry* v. *Peek*, 14 App. Cas. 337, 365, 371, 372, 374; *Le Lievre* v. *Gould*, 1893, 1 Q. B. 491, 498, 500. The statement of Lord Macnaghten in *Tackey* v. *McBain*, 1912, A. C. 186, 189, that in an action of deceit it is incumbent on the plaintiff to prove actual fraud, was apparently not meant to lay down a different rule.

(*i*) Above, p. 759.

(*k*) Selborne, C., *Coaks* v. *Boswell*, 11 App. Cas. 232, 236; see the cases cited below, p. 806, n. (*p*), and cf. above, pp. 756, 757.

(*l*) Rolfe, Alderson, BB., *Cornfoot* v. *Fowke*, 6 M. & W. 358, 370, 371.

(*m*) *Hern* v. *Nichols*, 1 Salk. 289; Parke, B., *Cornfoot* v. *Fowke*, 6 M. & W. 358, 373; *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259; *Swift* v. *Winterbotham*, L. R. 8 Q. B. 244; *Mackay* v. *Commercial Bank of New Brunswick*, L. R. 5 P. C. 394; *Swire* v. *Francis*, 3 App. Cas. 106; *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317; *George Whitechurch, Ld.* v. *Cavanagh*, 1902, A. C. 117, 140; *Giblan* v. *National, &c. Union*, 1903, 2 K. B. 600; *S. Pearson & Son, Ld.* v. *Dublin Corpn.*, 1907, A. C. 351; see also *Kettlewell* v. *Refuge Assurance Co.*, 1908, 1 K. B. 545, 1909, A. C. 243.

(*n*) See above, pp. 801, 802, as to the right of the party misled to rescind a contract so induced.

the object of avoiding any discovery which would or might be made by inquiries put to the principal himself. Such conduct would, it is considered, amount to an active concealment (*o*) by the principal, for which he would be personally liable (*p*). But unless such fraudulent conduct on the part of the principal himself could be shown, it is thought that there would be no cause of action of deceit against him; for he could not be liable for his agent's tort, as the agent did no wrong; nor would the agent's statement amount to a tort committed by the principal himself, if the principal did not expressly authorise it to be made, and did not in any way wrongfully conceal the truth (*q*). The principal is not liable for a fraudulent representation by his agent which is not within the scope of the agent's general authority (*r*); but if the agent is acting within the scope of his authority, the principal is liable whether the fraud is committed for the benefit of the principal or for the benefit of the agent himself (*s*). The agent is himself liable to the party misled in an action of deceit, if he made the false representation knowingly or recklessly: but otherwise not (*t*). If both principal and agent honestly believed the statement to be true, neither is liable to an action of deceit (*u*). Of course an action of deceit for a false representation inducing one to enter into a contract may be brought, not only against a party to the contract or his agent, but also under similar conditions (*x*) against any other person, who has fraudulently (*y*) made a false state-

Agent, where liable.

Action of deceit may lie against one not a party to the contract.

(*o*) Above, p. 801.

(*p*) Parke, B., *Cornfoot* v. *Fowke*, 6 M. & W. 358, 362, 373, 374; above, p. 760, n. (*b*); *Ludgater* v. *Love*, 44 L. T. 694.

(*q*) It is submitted that this particular case is not covered by the remarks of Lords Loreburn and Halsbury in *S. Pearson & Son, Ld.* v. *Dublin Corpn.*, 1907, A. C. 351, 354, 357-359, where the representation made was actually fraudulent on the part of the agent, who made it.

(*r*) *Barnett* v. *South London Tramways Co.*, 18 Q. B. D. 815; *George Whitechurch, Ld.* v. *Cavanagh*, 1902, A. C. 117.

(*s*) *Lloyd* v. *Grace, Smith & Co.*, 1912, A. C. 716, overruling, so far as they decided that the principal was not liable where the agent acted for his own personal advantage and not for the benefit of the principal, *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.*, 18 Q. B. D. 714, 718; *Thorne* v. *Heard*, 1894, 1 Ch. 599, 603, 611; 1895, A. C. 495, 502; *Ruben* v. *Great Fingall Consol., Ld.*, 1904, 2 K. B. 712, 725, 731, 1906, A. C. 439, 446; and cf. *Hambro* v. *Burnand*, 1904, 2 K. B. 10.

(*t*) *Swift* v. *Winterbotham*, L. R. 8 Q. B. 244, affirmed on this point, *Swift* v. *Jewsbury*, L. R. 9 Q. B. 301; *Derry* v. *Peek*, 14 App. Cas. 337.

(*u*) Parke, B., *Cornfoot* v. *Fowke*, 6 M. & W. 358, 373.

(*x*) Above, pp. 799 *sq.*, 804.

(*y*) Above, pp. 790, 798.

ment with the intent that the party, to whom the statement was made, should act upon it or in a manner apparently calculated to induce him to act upon it (*z*).

Contracts for sale of land are not voidable for non-disclosure.

It has already been pointed out (*a*) that contracts for the sale of land are not, as regards defects in the quality of the land itself or any building thereon, in the class of contracts *uberrimæ fidei;* the vendor is under no obligation to disclose any such defect, and if he merely keep silence regarding it, there is no ground for the purchaser to avoid the contract, or even, it is thought, to resist the specific performance thereof. The law is different, however, with respect to the suppression of a defect of title; as a man's title to land must necessarily lie within his own knowledge alone, and is not generally to be ascertained by independent investigation (*b*). Thus, if a vendor of land suppress the fact that it is subject to restrictive covenants, or disclose some only of such covenants and keep silence as to the rest, that is equivalent to a representation that the land is free from such covenants or is only subject to those mentioned (*c*); and if this representation induced the purchaser to make the contract, he may rescind it (*d*). And where a vendor makes a special condition of sale in general terms sufficient to preclude objection to some defect of title, but omits to disclose the defect or to bring it to the purchaser's notice, the purchaser may nevertheless resist the specific performance of the contract in equity, though he may be unable to rescind it (*e*). The *fraudulent* concealment of a defect of title gives rise to a right to rescind the contract, even after its completion; and it is thought that the contract may equally be set aside after completion, where a material defect of title has been knowingly concealed,

Except in case of suppression of defects of title.

Suppression of the existence of restrictive covenants.

Rescission after completion for concealment of defect of title.

(*z*) *Polhill* v. *Walter,* 3 B. & Ad. 114; *Langridge* v. *Levy,* 2 M. & W. 519, 4 M. & W. 337; see *Cann* v. *Willson,* 39 Ch. D. 39, overruled on the ground that the representation there made was not fraudulent; *Le Lievre* v. *Gould,* 1893, 1 Q. B. 491, 498, 499-501.

(*a*) Above, pp. 754-758.

(*b*) Above, p. 758, and n. (*m*).

(*c*) See above, pp. 39, 182, 681, 682.

(*d*) *Flight* v. *Booth,* 1 Bing. N. C. 370; *Phillips* v. *Caldcleugh,* L. R. 4 Q. B. 159; above, pp. 181, 339, and n. (*z*), 681.

(*e*) *Edwards* v. *Wickwar,* L. R. 1 Eq. 68; *Heywood* v. *Mallalieu,* 25 Ch. D. 357; *Nottingham Patent Brick and Tile Co.* v. *Butler,* 15 Q. B. D. 261, 16 Q. B. D. 778; *Re Marsh and Earl Granville,* 24 Ch. D. 11; *Re Davis and Cavey,* 40 Ch. D. 601; above, pp. 37, 66, n. (*b*), 182-184, 190; and see p. 194.

though without any actual intention to defraud (*f*). But in case of the innocent non-disclosure of such a defect, the purchaser can only rescind the contract, or resist its specific performance, before completion, and has no remedy after the contract has been completed by conveyance, unless the vendor's covenants for title should cover the defect (*g*).

Misrepresentation as a defence to a claim for specific performance.

Any misrepresentation, whether fraudulent or innocent, which is sufficient to avoid a contract (*h*), is a good defence to proceedings against the party misled for the specific performance of the contract (*i*). But, further, the Court may refuse to enforce specific performance of a contract at suit of a party, who has innocently made a misrepresentation to the other, in cases where the party misled would have no right to rescind the contract (*k*). This is owing to the discretionary nature of the relief of ordering specific performance, and to the fact that, in granting or withholding this remedy, the Court may have regard to considerations of unfairness or hardship and as to the parties' conduct, which could have no weight at law (*l*). We have already quoted several instances of innocent misrepresentation affording a bar to specific performance but not conferring the right to rescind the contract (*l*). It appears that an innocent misrepresentation may be a good cause for resisting specific performance, although it may not have actually induced the party misled to make the agreement; that is to say, where it cannot reasonably be supposed that he would not have entered into the contract except in the faith that the representation was true (*m*).

Sale by mistake or through

Here we may mention a form of mis-statement in connexion with the sale of land, which has not exactly the true charac-

(*f*) See *Edwards* v. *McLeay*, G. Coop. 308, 311, affirmed, 2 Swanst. 287, 289; *Mostyn* v. *West Mostyn Coal and Iron Co., Ld.*, 1 C. P. D. 145; *Carlish* v. *Salt*, 1906, 1 Ch. 335; above, pp. 804, 805.

(*g*) See *Re Leyland and Taylor's Contract*, 1900, 2 Ch. 625, 632; above, pp. 166, 167, 573, n. (*p*), 608, 613, 614.

(*h*) Above, pp. 798 *sq.*

(*i*) Above, pp. 794, 795.

(*k*) *Lamare* v. *Dixon*, L. R. 6 H. L. 414, 428; *Re Banister, Broad* v. *Munton*, 12 Ch. D. 131, 142, 147, 149; *Holliday* v. *Lockwood*, 1917, 2 Ch. 47, 56, 57; above, pp. 185, 760.

(*l*) See the cases stated and cited above, pp. 36, 37, 182-184, 189-191, 758, 760, 765; and *Holliday* v. *Lockwood*, ubi sup.

(*m*) See previous note; *Holliday* v. *Lockwood*, ubi sup.; above, p. 803, n. (*x*); and cf. above, pp. 789, 803.

teristics of a misrepresentation inducing the contract, but partakes of the same nature. That is where a man by mistake or inadvertence, or through fraud, sells some property, of which he is not entitled to dispose (*n*). In this case there will, in the ordinary course of things, be a breach of his obligation to show a good title. We have seen (*o*) that such a breach of the vendor's obligation under the contract will justify the purchaser in rescinding it: but in these circumstances the right of rescission is founded rather on the fact that the vendor cannot deliver the article contracted for, than on a false representation inducing the purchaser's consent (*p*). At the same time the vendor, by making the contract of sale, impliedly represents that he has the property described to dispose of; and it is on the ground of his estoppel by this representation that the Court allows the purchaser to claim specific performance with compensation, where the vendor has good right to a part, but not the whole, of the property sold (*q*). And if this implied representation were fraudulently made, the same consequences follow as if there had been a positive assertion in words of the vendor's ownership, and that representation had induced the other to enter into the contract (*r*).

fraud of land to which the vendor has no title.

As before mentioned (*s*), a person induced by misrepresentation, whether fraudulent or innocent, to enter into a contract for the sale of land, has the option of rescinding or affirming it: but the contract is voidable only, not void, and remains good until set aside (*t*). If the party so misled, being the purchaser, elect to affirm the agreement, he may, as a rule, enforce specific performance with compensation for the deficiency; and the limits of his right in this respect have been already explained (*u*). If the party misled propose to rescind the contract, his election to do so must be made within a reasonable time after the discovery of the misrepresentation; for long delay in claim-

Election to rescind or affirm a contract induced by misrepresentation.

Purchaser's right to specific performance with compensation.

Election to rescind must be made within a reasonable time.

(*n*) Above, pp. 678, 681, 682.
(*o*) Above, p. 793.
(*p*) See *Re Hare and O'More's Contract*, 1901, 1 Ch. 93, where the contract was rescinded in a Vendor and Purchaser summons, a proceeding in which there is no jurisdiction to rescind for misrepresentation *as such;* below, p. 810, n. (*z*).
(*q*) Above, p. 678.
(*r*) Above, pp. 614, 803.
(*s*) Above, pp. 790, 795.
(*t*) *United Shoe, &c. Co.* v. *Brunet*, 1909, A. C. 330, 339.
(*u*) Above, pp. 678-684, 795.

Must be communicated.

ing rescission after he has become aware of the true facts may be evidence of an intention to affirm the contract (*x*). And his election to rescind the contract must be communicated to the other party (*y*). If he elect to rescind the contract, he is entitled to take active proceedings under the equitable jurisdiction of the Court to have the agreement set aside and cancelled; he is not obliged to wait for this relief until he is sued thereon by the other party (*z*). Election to affirm the agreement may not only be expressly declared, but may be inferred from the acts of the party concerned (*a*), as by a purchaser's exercising acts of ownership in respect of the property bought (*b*).

Election may be evidenced by acts.

No rescission after an election to affirm the contract.

Nor where by the act of the party

When the party misled, being aware of the misrepresentation made, has once elected to affirm the contract, he cannot afterwards rescind it (*c*). And where through the act of the person entitled otherwise to avoid the contract it has become impossible to restore the parties to their former position, the

(*x*) *Clough* v. *London and North Western Ry. Co.*, L. R. 7 Ex. 26, 34, 35; *Morrison* v. *Universal Marine Insurance Co.*, L. R. 8 Ex. 197, 203; *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221, 239 *sq.*; *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, 1277; *Re Duncan*, 1899, 1 Ch. 387, 390; *Seddon* v. *North Eastern Salt Co.*, 1905, 1 Ch. 326; *United Shoe, &c. Co.* v. *Brunet*, 1909, A. C. 330, 339; and see *Charter* v. *Trevelyan*, 11 Cl. & Fin. 714, 720; *Imperial Ottoman Bank* v. *Trustees, &c. Corp.*, 13 R. 287. If the party misled point out the misrepresentation, and the other make proposals for removing its effect, the right of rescission is only suspended and may be exercised, if the proposals fall through; *Tibbatts* v. *Boulter*, 73 L. T. 534. As to delay in taking proceedings to rescind a contract for fraud, see *Vatcher* v. *Paull*, 1915, A. C. 372, 382; as to concealed fraud, see *Oelkers* v. *Ellis*, 1914, 2 K. B. 139.

(*y*) *Bwlch-y-Plwm Lead Mining Co.* v. *Baynes*, L. R. 2 Ex. 324; *Ashley's case*, L. R. 9 Eq. 263; and see *Re Duncan*, 1899, 1 Ch. 387, 390.

(*z*) Above, pp. 794, 796, 797; *Hoare* v. *Bremridge*, L. R. 8 Ch. 22, 26; *London and Provincial Insurance Co.* v. *Seymour*, L. R. 17 Eq. 85. If sued, he may counter-claim for rescission; *Redgrave* v. *Hurd*, 20 Ch. D. 1; *Smith* v. *Land and House Property Corp.*, 28 Ch. D. 7. But a claim to rescind the contract for misrepresentation cannot be made in a Vendor and Purchaser summons; *Re Hughes and Ashley's Contract*, 1900, 2 Ch. 595; see below, Chap. XIX. § 4.

(*a*) *Clough* v. *London and North Western Ry. Co.*, L. R. 7 Ex. 26, 37; *Law* v. *Law*, 1905, 1 Ch. 140, 158, 159.

(*b*) *Expte. Briggs*, L. R. 1 Eq. 483; *Scholey* v. *Central Ry. Co. of Venezuela*, L. R. 9 Eq. 266, n.; *Seddon* v. *North Eastern Salt Co.*, 1905, 1 Ch. 326; *Stoddart* v. *Union Trust, Ltd.*, 1912, 1 K. B. 181; cf. above, p. 178.

(*c*) *Clough* v. *London and North Western Ry. Co.*, L. R. 7 Ex. 26, 34; *Law* v. *Law*, 1905, 1 Ch. 140, 158, 159; *United Shoe, &c. Co.* v. *Brunet*, 1909, A. C. 330, 339.

contract can no longer be rescinded (*d*); though a mere deterioration through use of some property purchased under a contract voidable for fraud will not prevent the rescission of the contract, if a payment in money would be an adequate compensation therefor (*e*). Thus, if one induced to purchase mines by a fraudulent misrepresentation have entered into possession and worked out the mines, it appears that he cannot afterwards rescind the contract (*f*); but if in such circumstances mines or similar properties be only partially worked, so that their depreciation would be a proper subject for compensation, that will be no bar to a claim for rescission, though in taking the accounts (*g*) the purchaser will be charged with a due allowance for the deterioration (*h*). These rules, however, apply only where the act of *the party claiming to rescind* has made complete restitution impossible. The defrauding party cannot resist rescission on the ground that *his* act has prevented the possibility of such restitution (*i*). Thus, on a sale of mines voidable at the vendor's instance, he may set aside the sale, notwithstanding that the purchaser has worked them (*k*). As was pointed out in the previous chapter, the right to set aside a contract of sale or a conveyance of lands induced by fraud cannot be enforced, either at law or in equity, as against any person who has acquired the land sold, or any part thereof or interest therein, as a purchaser for valuable consideration in good faith and without notice of the fraud (*l*). *A fortiori*, the equity to set aside a contract for innocent misrepresentation would not be enforceable against any such purchaser. In the case of innocent misrepresentation, however, this point can hardly arise; since it is held that contracts for the sale of land induced by innocent misrepresentation cannot be set aside after completion (*m*); and the plea

claiming to rescind *restitutio in integrum* has become impossible.

No rescission as against a purchaser for value without notice.

No rescission for innocent misrepresentation after completion.

(*d*) *Clarke* v. *Dickson*, E. B. & E. 148; *Western Bank of Scotland* v. *Addie*, L. R. 1 Sc. 145, 159, 165; *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, 1278; Romer, J., *Rees* v. *De Bernardy*, 1896, 2 Ch. 437, 446; *Hutton* v. *Hutton*, 1917, 1 K. B. 813, 821-3, 825-6.

(*e*) *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, 1278; *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, 1899, 2 Ch. 392, 433, 456; *Hutton* v. *Hutton*, ubi sup.

(*f*) See *Vigers* v. *Pike*, 8 Cl. & Fin. 562, 650.

(*g*) See below, p. 816.

(*h*) Above, n. (*e*).

(*i*) *Phosphate Sewage Co.* v. *Hartmont*, 5 Ch. D. 394, 448, 449, 452; *Rees* v. *De Bernardy*, 1896, 2 Ch. 437, 446.

(*k*) See *Gresley* v. *Mousley*, 4 De G. & J. 78.

(*l*) Above, p. 748.

(*m*) Above, pp. 795-797.

of purchase for value without notice cannot be set up by an assignee of the benefit of the contract, whilst it remains a mere chose in action (*n*). Subject to the limitations indicated in this paragraph, a contract to sell land may, if induced by fraud, be set aside after as well as before completion (*o*). And as we have seen, an action can be maintained, after completion, to recover damages at law for a false representation innocently made in connexion with the formation of a contract for the sale of land, if the representation amounted to a warranty collateral to the contract, but otherwise not (*p*).

By what persons the right of rescission is exercisable.

The right to rescind a contract for the sale of land on the ground of misrepresentation, fraudulent or innocent, is not personal to the contracting party; it may be exercised by his representatives after his death; and in the vendor's case, the right forms part of his real estate, and the benefit thereof will belong to his heir or devisee (*q*). So also the contracting party's assigns in his lifetime by operation of law, who take the benefit of the contract, as his trustee in bankruptcy (*r*), have the same election to avoid or confirm it as he had himself. The vendor's right to set aside after completion a contract for the sale of land induced by fraud appears to be so far an interest in the land that it is devisable by his will, and will pass under a general devise of all his real estate (*s*). It has been held, however, that an assignment by act *inter vivos* of a bare right of suit in equity to set aside a conveyance or a release for fraud is obnoxious to the laws of maintenance and champerty and is therefore void (*t*): but such an assignment may be made by a trustee in bankruptcy under the special provisions of the Bankruptcy laws (*u*). If either the vendor or the purchaser assign over the whole benefit of the contract pending completion (*x*)

Assignee of a voidable contract pending completion.

(*n*) Above, p. 749.
(*o*) Above, pp. 613, 614, 794, 795.
(*p*) Above, pp. 575, 793, 794.
(*q*) See *Trevelyan* v. *White*, 1 Beav. 588; *Charter* v. *Trevelyan*, 11 Cl. & Fin. 714; *Stump* v. *Gaby*, 2 De G., M. & G. 623, 630; *Gresley* v. *Mousley*, 4 De G. & J. 78, 93; above, pp. 502 *sq.*, 508.
(*r*) Above, pp. 518, 523. See also, p. 533.
(*s*) *Gresley* v. *Mousley*, 4 De G. & J. 78, 93.
(*t*) *Prosser* v. *Edmonds*, 1 Y. & C. Ex. 481; *De Hoghton* v. *Money*, L. R. 2 Ch. 164, 169; *Hill* v. *Boyle*, L. R. 4 Eq. 260; *Fitzroy* v. *Cave*, 1905, 2 K. B. 364, 371; see above, p. 387, n. (*o*).
(*u*) *Seear* v. *Lawson*, 15 Ch. D. 426; *Guy* v. *Churchill*, 40 Ch. D. 481; and see *Re Park Gate Waggon Works Co.*, 17 Ch. D. 234.
(*x*) Above, p. 537.

without being aware of some misrepresentation by the other party sufficient to avoid the contract, it appears that the assignee, for whom the assignor would be a trustee of all his rights under the contract, would have the benefit of the option to rescind or affirm the contract, and of the right to specific performance with compensation. But if the assignor were aware of the misrepresentation when he assigned over the benefit of the contract, then it seems that the assignment, being the exercise of an act of ownership, would be evidence of an election to affirm the contract (*y*); and in such case it appears that the assignee could no more rescind the contract than the assignor himself (*z*). But the assignee would have the original contractor's right to claim compensation in proceedings either for specific performance or for breach of any warranty implied in the representation (*a*).

Against what persons the right of rescission is exercisable.

The right of rescission is exercisable, with the limitations above mentioned, against the other party's representatives after his death, his assigns for value or otherwise of the benefit of the contract so long as it remains a mere chose in action (*b*), and in the case of a purchaser, against his assigns, taking by operation of law (*c*) or by his own act, but either gratuitously (*d*) or on purchase *with* notice of the fraud (*e*), of the property purchased or any interest therein (*f*).

Action of deceit maintainable after death of party deceived.

An action of deceit for a false representation, whereby a man's personal estate has suffered damage, is maintainable under stat. 4 Edw. III. c. 7 (*g*), by his executors or administrators after his death (*h*). But an action to recover damages for deceit

(*y*) Above, p. 810.
(*z*) Above, p. 810.
(*a*) Above, pp. 789-792, 794-796, 809; and see below, p. 814.
(*b*) Above, p. 749. But a purchaser under a contract induced by fraud claiming, not to rescind, but to recover damages for the tort, must pay the whole purchase money to the vendor's assignee thereof without notice of the fraud: *Stoddart* v. *Union Trust, Ltd.*, 1912, 1 K. B. 181.
(*c*) *Load* v. *Green*, 15 M. & W. 216, 221; *Re Eastgate*, 1905, 1 K. B. 465; *Tilley* v. *Bowman, Ld.*, 1910, 1 K. B. 745.
(*d*) *Bridgeman* v. *Green*, Wilm. 58, 64, 65.
(*e*) *Trevelyan* v. *White*, 1 Beav. 588; *Charter* v. *Trevelyan*, 11 Cl. & Fin. 714.
(*f*) As to delay in claiming rescission and as to concealed fraud, see above, p. 810, n. (*x*).
(*g*) See Wms. Pers. Prop. 163, 17th ed.
(*h*) *Twycross* v. *Grant*, 4 C. P. D. 40; and see *Hatchard* v. *Mège*, 18 Q. B. D. 771; *Oakey* v. *Dalton*, 35 Ch. D. 700.

But not of deceiving party.

cannot, in general, be maintained after the death of the deceiving party (*i*). If, however, the wrong were done within six calendar months before the wrongdoer's death (*k*), it is thought that an action would be maintainable therefor against his executors or administrators under stat. 3 & 4 Will. IV. c. 42, s. 2 (*l*). For as the personal representatives of the party deceived may sue for the wrong done, as being an injury to his personal estate (*m*), it appears that the cause of action must be a wrong done in respect of his property within the meaning of that statute (*n*). The direct assignment of a bare right of action of deceit appears to be obnoxious to the laws of maintenance and champerty and to be void on that account (*o*). But it may be contended that, where the whole benefit of a contract induced by fraud has been assigned over in good faith and for value, pending completion and before the discovery of the fraud (*p*), the assignee should be entitled, if he elect to affirm the contract, to succeed by subrogation to all the assignor's rights to compensation for the fraud; and should be enabled to sue the wrongdoer for damages at law in the assignor's name in the same manner as an insurer, who has paid compensation for damages caused by a wrong, may have the benefit of any action maintainable against the wrongdoer for the tort (*q*).

(*i*) *Peek* v. *Gurney*, L. R. 6 H. L. 377, 392; *Re Duncan*, 1899, 1 Ch. 387. It appears from the latter case that the suggestions to the contrary thrown out in *Twycross* v. *Grant*, 4 C. P. D. 40, 42, 46, 47, were not well founded in law.

(*k*) See *Kirk* v. *Todd*, 21 Ch. D. 484.

(*l*) See Wms. Pers. Prop. 165, 17th ed. The action must be brought within six calendar months after the executors or administrators have taken upon themselves the administration of the deceased person's estate. See *Re Williames*, 52 L. T. 41.

(*m*) Note (*h*), p. 813, above.

(*n*) See also *Erskine* v. *Adeane*, L. R. 8 Ch. 756, 760; *Morgan* v. *Ravey*, 30 L. J. Ex. 131; *Jenks* v. *Clifden*, 1897, 1 Ch. 694.

(*o*) Above, p. 812; Co. Litt. 368b; Vin. Abr. Maintenance (B., C.); *Prosser* v. *Edmonds*, 1 Y. & C. 481; *De Hoghton* v. *Money*, L. R. 2 Ch. 164, 169; *Ball* v. *Warwick*, 50 L. J. C. P. D. 382; *James* v. *Kerr*, 40 Ch. D. 449; *Guy* v. *Churchill*, 40 Ch. D. 481, 485. The question, to what extent a right of action in tort is assignable, is discussed by the writer in L. Q. R. x. 147 *sq.*, and Wms. Pers. Prop. 168-171, 17th ed.

(*p*) See above, pp. 812, 813.

(*q*) See *Randal* v. *Cockran*, 1 Ves. sen. 98; *Mason* v. *Sainsbury*, 3 Doug. 61, 64; *Yates* v. *Whyte*, 4 Bing. N. C. 272, 283, 284; *Simpson* v. *Thomson*, 3 App. Cas. 279, 284-286, 290-295; *Castellain* v. *Preston*, 11 Q. B. D. 380, 388, 403, 404; *King* v. *Victoria Insurance Co.*, 1896, A. C. 250; Wms. Pers. Prop. 170, 171, 17th ed.; L. Q. R. x. 150, 151, 156, 157.

If a contract for the sale of land be lawfully rescinded, before completion, on the ground of misrepresentation, the party rescinding is entitled to be recouped all payments made and expenses incurred by him in the discharge of any obligation imposed on him by the contract, and to be indemnified against all liabilities assumed by him pursuant to any such obligation: but he is not entitled, where the misrepresentation was not fraudulent, to recover damages for what may be called his collateral losses—those which were not occasioned by or in the course of his discharge of some duty under the contract (*r*). Thus, if the party rescinding be the purchaser, he is entitled to recover his deposit or any other instalment of his purchase money paid by him, with interest thereon at the rate of 4*l*. per cent. per annum, and to be recouped his expenses of the investigation of title (*s*); and he has a lien on the land sold for the amount so due to him until repayment (*t*). But if one be induced to buy land by a false representation innocently made that it is fit for the purposes of some particular business, and enter into possession pending completion, but pursuant to the contract, and carry on the business there at a loss, and then discover the untruth of the representation and rescind in consequence, he cannot recover compensation for his losses in the business (*u*).

On what terms the contract will be rescinded before completion.

Purchaser's lien, where the contract is rescinded.

(*r*) *Redgrave* v. *Hurd,* 20 Ch. D. 1; *Newbigging* v. *Adam,* 34 Ch. D. 582, 589, 593-595, 596; *Adam* v. *Newbigging,* 13 App. Cas. 308, 324, 331; *Whittington* v. *Seale-Hayne,* 82 L. T. 49, 51.

(*s*) *Smith* v. *Land and House Property Corp.,* 28 Ch. D. 7, 9; *Re Hare and O'More's Contract,* 1901, 1 Ch. 93, 97; *Cree* v. *Stone,* Times Newspaper, 10th May, 1907.

(*t*) *Wythes* v. *Lee,* 3 Drew. 396; *Rose* v. *Watson,* 10 H. L. C. 671, 682; *Aberaman Ironworks* v. *Wickens,* L. R. 4 Ch. 101, 109, 110; *Mycock* v. *Beatson,* 13 Ch. D. 384; *Whitbread & Co.* v. *Watt,* 1901, 1 Ch. 911, 1902, 1 Ch. 835; *Kitton* v. *Hewett,* 1904, W. N. 21; and see *Ridout* v. *Fowler,* 1904, 1 Ch. 658.

(*u*) *Whittington* v. *Seale-Hayne,* 82 L. T. 49. It is submitted that this case and those cited above, p. 797, n. (*b*), show that it is no bar to the right to rescind a contract for innocent misrepresentation that the purchaser has taken possession, pending completion, in pursuance of the contract; and that under the present law the case of *Blackburn* v. *Smith,* 2 Ex. 783, is no longer of authority on this point; and see above, pp. 177, 178. The mere occupation of land is not considered, in equity at least, to prevent *restitutio in integrum:* and even the commission of waste, as in working mines, may not have that effect; above, p. 811. Where a contract for the sale of land is rescinded for misrepresentation, innocent or fraudulent, before completion but after the purchaser has taken possession under the contract, it is thought that the like accounts would be ordered to be taken, for the purpose of replacing the parties in their former position, as are directed when the contract is set aside for fraud after completion; see below, p. 816.

If the vendor of land rescind the contract, pending completion, because of misrepresentation, it is submitted that, on the principles above stated, he is entitled to be recouped his expenses of proving his title pursuant to the obligation in that behalf imposed upon him by the contract. But it seems questionable whether either party rescinding for innocent misrepresentation can recover his expenses of entering into the agreement; this loss seems to be in the nature of damage suffered by reason of the representation rather than outlay made in discharge of an obligation imposed by the contract (*x*). If, however, the representation were fraudulent, the defrauded party would be entitled to recover all damages attributable to the fraud, and he would certainly have the right to be re-imbursed these expenses (*y*); and it appears that, in the case of a defrauded purchaser, he should have a lien for them (*z*).

On what terms the contract will be rescinded after completion.

If a contract for the sale of land be set aside, on the ground of fraud, after completion, the vendor rescinding is entitled, not only to be restored to the possession of the land, but also to recover the amount of the rents and profits thereof during the time when the purchaser was in possession; and the purchaser must account for all rents and profits, which he has received, and will be charged with an occupation rent for any part of the land which he has occupied himself (*a*). The vendor is also entitled to recover his expenses incurred in connexion with the sale (*b*), or with enforcing his right to set it aside, such as money paid to redeem some mortgage which the purchaser has made (*c*). On the other hand, the vendor must return the purchase money with interest at the rate of 4*l*. per cent. per annum (*d*). And

(*x*) As to the expenses recoverable as damages for breach of the contract, see below, Chap. XIX. § 2.

(*y*) *Edwards* v. *McLeay*, G. Coop. 308, 318, 2 Swanst. 287, 289; *Berry* v. *Armistead*, 2 Keen, 221, 229; *Hart* v. *Swaine*, 7 Ch. D. 42, 47.

(*z*) See *Mycock* v. *Beatson*, 13 Ch. D. 386; and the cases cited in the previous note.

(*a*) *Donovan* v. *Fricker*, Jac. 165; *Trevelyan* v. *White*, 1 Beav. 588; affirmed, *Charter* v. *Trevelyan*, 11 Cl. & Fin. 713; *Haygarth* v. *Wearing*, L. R. 12 Eq. 320, 330.

(*b*) *Edwards* v. *McLeay*, G. Coop. 308, 318, 2 Swanst. 287, 289; *Berry* v. *Armistead*, 2 Keen, 221, 229; *Hart* v. *Swaine*, 7 Ch. D. 42, 47.

(*c*) See *Tilley* v. *Bowman, Ltd.*, 1910, 1 K. B. 745, deciding that money so paid by the vendor may be set off, in case of the purchaser's bankruptcy, against the vendor's obligation to return the price.

(*d*) See *Silkstone, &c. Co.* v. *Edey*, 1900, 1 Ch. 167, 171. £4 per cent. still appears to be the rate of interest chargeable; see also *Re*

the purchaser will be entitled to an allowance for all necessary outgoings and also, it seems, for substantial repairs and lasting improvements (*e*). Similarly, the purchaser so rescinding is entitled to be repaid the purchase money with interest at the same rate and his expenses incurred in connexion with the purchase (*ee*), but must account for the rents and profits received by him and pay an occupation rent for any land in hand, and compensation for any deterioration caused by his use of the property, as in working mines (*f*); and he is entitled to the like allowance for necessary outgoings, substantial repairs and improvements (*d*). But it seems that, if an action be brought to set aside the conveyance, any claim to an allowance for substantial repairs and improvements ought to be specially made (*g*). If the amount chargeable against the purchaser for rents and profits exceed the interest on the purchase money, the accounts may be directed to be taken with annual rests, so that the excess of the profits above the interest may be applied in reduction of the principal (*h*): but a special case must be made out for taking the accounts in this way (*i*). The purchaser may in a proper case be directed to account for any rents and profits which he might, but for his wilful default, have received: but it appears that special circumstances must be shown in order to obtain this direction (*k*). A special case certainly seems necessary to charge the purchaser on the footing of wilful default, where he is the party defrauded (*l*). But where the fraud was his, he would, it is thought, be more readily charged on that

Whether purchaser chargeable on the footing of wilful default.

Hunt, 1902, 2 Ch. 318, n.; *Re Davy,* 1908, 1 Ch. 61; *Re Cooke,* 1916, 1 Ch. 480, 492; cf. *Re Bailey,* 61 Sol. J. 398.

(*e*) See notes (*a*), (*b*), above, p. 816.

(*ee*) See note (*b*), p. 816.

(*f*) Above, pp. 810, 811.

(*g*) *Edwards* v. *McLeay,* G. Coop. 308, 318, 2 Swanst. 287, 289; see also *Baugh* v. *Price,* 1 Wils. K. B. 320, 322; *Haygarth* v. *Wearing,* L. R. 12 Eq. 320, 330.

(*h*) *Donovan* v. *Fricker,* Jac. 165.

(*i*) *Neesom* v. *Clarkson,* 4 Hare, 97, 105.

(*k*) See the cases cited, p. 816, nn. (*a*), (*b*), above; *Howell* v. *Howell,* 2 My. & Cr. 478, 486; *Murray* v. *Palmer,* 2 Sch. & Lef. 474, 489, where however the decree made does not accord with the judgment; *Gibson* v. *D'Este,* 2 Y. & C. C. C. 542, 581; reversed, *Wilde* v. *Gibson,* 1 H. L. C. 605, 636; *Prees* v. *Coke,* L. R. 6 Ch. 645, 651; above, p. 491.

(*l*) Such an account was directed as against a purchaser held entitled to rescind in *Gibson* v. *D'Este,* 2 Y. & C. C. C. 542, 581, reversed as mentioned above, n. (*k*). But it is submitted that this was clearly wrong; see *Howell* v. *Howell,* 2 My. & Cr. 478, 486.

footing (*m*). The purchaser is not chargeable with interest on the rents and profits for which he is accountable (*n*). But where the *vendor* is entitled to rescind (*o*), the purchaser is chargeable with any depreciation in the value of the land caused by any act of waste or deterioration, which he has committed (*p*). And, as we have seen (*q*), the purchaser rescinding may have to make a similar allowance.

Forged documents.

In connexion with the subject of fraud, it may be mentioned that a forged document, whether it be a deed or a simple writing, is, as a rule, an absolute nullity (*r*). If it be a conveyance, no interest passes thereby (*s*); if it be a power of attorney, it confers no authority (*t*); and if it take the form of a contract, it imposes no liability on any party whose seal or signature thereto is forged (*u*). And if it assume the shape of a negotiable instrument, it acquires no validity in the hands of a purchaser for value in good faith and without notice of the forgery (*x*). A forgery, being an illegal act, cannot, strictly speaking, be ratified by the person whose seal or signature is counterfeited (*y*). But the seal or signature, or the forged document, may be adopted by him as his own and may acquire validity as against him under the doctrine of estoppel by con-

Adoption of a forged instrument.

(*m*) See *Howell* v. *Howell*, 2 My. & Cr. 478, 486; *Adams* v. *Sworder*, 2 De G., J. & S. 44, 61; *Tate* v. *Williamson*, L. R. 2 Ch. 55; Seton on Judgments, 2253, 7th ed.; *Silkstone, &c. Co.* v. *Edey*, 1900, 1 Ch. 167.

(*n*) See cases cited above, p. 816, nn. (*a*), (*b*); *Silkstone, &c. Co.* v. *Edey*, 1900, 1 Ch. 167.

(*o*) See above, p. 811.

(*p*) See *Expte. Bennett*, 10 Ves. 381, 400, 401; *Robinson* v. *Ridley*, 6 Madd. 2; *Gresley* v. *Mousley*, 4 De G. & J. 78.

(*q*) Above, p. 811.

(*r*) *Johnson* v. *Windle*, 3 Bing. N. C. 225; *Robarts* v. *Tucker*, 16 Q. B. 560; *Brocklesby* v. *Temperance Bdg. Soc.*, 1893, 3 Ch. 130, 135, 137, 1895, A. C. 173, 184; *Ruben* v. *Great Fingall Consol., Ld.*, 1904, 2 K. B. 712, 1906, A. C. 439.

(*s*) *Boursot* v. *Savage*, L. R. 2 Eq. 134; *Re Cooper*, 20 Ch. D. 611; *Barton* v. *North Staffs. Ry. Co.*, 38 Ch. D. 458; *Jared* v. *Clements*, 1903, 1 Ch. 428; *Re De Leeuw*, 1922, 2 Ch. 540, 549, 550.

(*t*) *Bank of Ireland* v. *Trustees of Evans' Charities*, 5 H. L. C. 389; *Corp. of Staple* v. *Bank of England*, 21 Q. B. D. 160; *Oliver* v. *Bank of England*, 1901, 1 Ch. 652, 654; affirmed, 1902, 1 Ch. 610, and nom. *Starkey* v. *Bank of England*, 1903, A. C. 114.

(*u*) See note (*r*), above, and next note.

(*x*) *Esdaile* v. *La Nauze*, 1 Y. & C. Ex. 394; *Fearn* v. *Filica*, 7 Man. & Gr. 513; *Burchfield* v. *Moore*, 3 E. & B. 683; *Bobbett* v. *Pinkett*, 1 Ex. D. 368, 374; *Arnold* v. *Cheque Bank*, 1 C. P. D. 578; *Capital and Counties Bank* v. *Gordon*, 1903, A. C. 240.

(*y*) *Brook* v. *Hook*, L. R. 6 Ex. 89.

duct (*z*). Thus, if one admit or represent a forged document to have been signed or sealed by him, he will be liable thereunder to any person who has altered his position on the faith of this representation (*a*). So, if one endorse a forged bill of exchange, he will be liable thereon to a holder in due course (*b*). Money paid on the faith that a forged document is genuine is paid under a mistake of fact and may in general be recovered back (*c*): but if the amount payable under a forged bill of exchange or promissory note be paid by a person liable thereon to a *bonâ fide* holder in the belief that it was genuine, the sum paid cannot be recovered from him, unless notice of the forgery be given to him at once before he has altered his position in consequence of the payment, and at latest on the same day (*d*). If an agent innocently make use of a forged authority from his principal or supposed principal, he is liable under the doctrine of implied warranty of authority to make good any damage suffered by any person whom he has induced to act on the faith of the authority being genuine (*e*).

Recovery of money paid on the faith of a forged document.

Liability of agent propounding a forged authority.

§ 2.—*Of duress and undue influence.*

We have seen (*f*) that, in order to make a valid contract, there must be *free* consent of the parties. Contracts induced by duress or undue influence are wanting in this element of validity: but in such contracts, as in the case of agreements induced by fraud,

Contracts induced by duress or undue influence are voidable.

(*z*) Above, p. 742.

(*a*) *Leach* v. *Buchanan*, 4 Esp. 226; *Ashpitel* v. *Bryan*, 3 B. & S. 474, 492, 493; *M'Kenzie* v. *British Linen Co.*, 6 App. Cas. 82, 99-101, 109; and see *Re Bahia and San Francisco Ry. Co.*, L. R. 3 Q. B. 584; *Simm* v. *Anglo-American Telegraph Co.*, 5 Q. B. D. 188; *Shaw* v. *Port Philip Gold Mining Co.*, 13 Q. B. D. 103; *Sheffield Corp.* v. *Barclay*, 1903, 2 K. B. 580; *Ruben* v. *Great Fingall Consol., Ld.*, 1904, 2 K. B. 712, 1906, A. C. 439.

(*b*) *Bank of England* v. *Vagliano*, 1891, A. C. 107, 116.

(*c*) *Jones* v. *Ryde*, 5 Taunt. 488; *Wilkinson* v. *Johnston*, 3 B. & C. 428, 434; *Gurney* v. *Womersley*, 4 E. & B. 133. As to the recovery of money paid under a mistake of fact, see *Kelly* v. *Solari*, 9 M. & W. 54; *Re Bodega Co., Ld.*, 1904, 1 Ch. 276; *Baker* v. *Courage*, 1910, 1 K. B. 56; *Baylis* v. *Bishop of London*, 1913, 1 Ch. 127; and as to the recovery from an agent of money so paid to him, see *Pollard* v. *Bank of England*, L. R. 6 Q. B. 623, 630; *Taylor* v. *Metropolitan Ry.*, 1906, 2 K. B. 55, 63; and consider *Steam Saw Mills Co.* v. *Baring Bros. & Co.*, 1922, 1 Ch. 244.

Recovery of of money paid under mistake of fact.

(*d*) *Cocks* v. *Masterman*, 9 B. & C. 902; *London and River Plate Bank* v. *Bank of Liverpool*, 1896, 1 Q. B. 7.

(*e*) *Starkey* v. *Bank of England*, 1903, A. C. 114; *Bank of England* v. *Cutler*, 1908, 2 K. B. 208.

(*f*) Above, p. 1.

there is not the entire absence of consent which is characteristic of mistake (*g*). The party coerced or unduly influenced does really consent to the proposed agreement; only he would not have done so had he been a free agent (*h*). Contracts induced by duress or undue influence are therefore not void: but they are voidable at the option of the party whose consent was so procured (*i*). The common law did not go beyond avoiding contracts induced by duress, that is, actual force or threats of violence. And it is laid down that the duress must be of the person and not of property (as by wrongfully taking or withholding goods, or threatening to do so); and that if actual force were not used, there must be the fear of losing life or limb, or of unlawful imprisonment. Thus battery was duress, but not the mere threat of battery (*k*). And the duress must have been used to the party to the contract himself or to his wife, child or parent (*l*). In equity, however, a far wider jurisdiction was assumed to set aside contracts made without *free* consent; and it was adjudged to be sufficient to avoid a contract or a conveyance if there were such constraint of the will of the party making it that his consent (*m*) thereto were not free, although the constraint did not amount to duress at common law (*n*). And this doctrine of equity is by no means confined to the inducement of consent by outward force or fear; it extends to every case in which such influence is exerted by one party to a contract or conveyance over the mind of another that the other

Duress at common law.

Equitable doctrine of undue influence.

(*g*) Above, pp. 740, 748.

(*h*) Cf. above, p. 748.

(*i*) Bract. fo. 100b (§ 13), 396b (§ 3); 2 Inst. 482; *Whelpdale's case*, 5 Rep. 119, and cases cited below. It may be noted that, in the case of the marriage contract, which is peculiar and of which the initial validity or invalidity depends partly on considerations foreign to the common law, a consent induced by fraud, force or fear, may be treated as being no consent at all; see *Fulwood's case*, Cro. Car. 488, 493; *Harford* v. *Morris*, 2 Hagg. Cons. 423, 425, 436; *Field's Marriage*, 2 H. L. C. 48, 58-62; *Scott* v. *Sebright*, 12 P. D. 21; *Cooper* v. *Crane*, 1891, P. 369, 376; *Ford* v. *Stier*, 1896, P. 1; 1 Black. Comm. 433-436; Bishop on Marriage and Divorce (Chicago, 1891), vol. i. § 548; *Moss* v. *Moss*, 1897, P. 263, 271 *sq.*

(*k*) 2 Inst. 483; Bac. Abr. Duress (A); 1 Black. Comm. 130, 131, 136; *Skeate* v. *Beale*, 11 A. & E. 983, 990.

(*l*) Bac. Abr. Duress (B).

(*m*) See above, p. 741 and n. (*h*).

(*n*) *A.-G.* v. *Sothon*, 2 Vern. 497; *Huguenin* v. *Baseley*, 14 Ves. 273, 294; *Peel* v. ——, 16 Ves. 157, 159; and see *Chesterfield* v. *Janssen*, 2 Ves. sen. 125, 155-157, where this jurisdiction is alluded to as a branch of the equitable jurisdiction to relieve against fraud.

does not in fact consent thereto of his own free will (*o*). The question to be determined in each case is whether the party, who alleges that he was unduly influenced, agreed to the contract or conveyance made as a free agent exercising his own untrammelled volition; and if he did not, he may avoid the transaction (*o*).

Two classes of cases of undue influence.

1. Where exercised independently of any special relation between the parties.

2. Where implied from the existence of some confidential relation.

The cases, in which a contract or conveyance may be avoided for undue influence, are usually divided into two classes. The first is where the alleged ground of avoidance simply is that the one party did in fact actively exercise such influence over the other's mind that he was not a free agent, and it is not asserted that the one stood in any confidential relation to the other (*p*). The second is where it is claimed that *undue* influence should be implied from the fact that there was a confidential relation between the parties, which invested the one with a peculiar authority over the other, or imposed on him a special duty of advising the other (*q*). In both classes the question to be determined is the same; was such influence exerted as to interfere with the freedom of the other's will? But they differ with respect to the burthen of proof. This lies, in the first class, entirely on the party who seeks to set the transaction aside (*r*). In the second, the plaintiff must show that the alleged confidential relation existed: but when this has been established, it is presumed, until the contrary be shown, that advantage was taken of it; and the obligation then lies on the defendant of proving that the plaintiff was not unduly influenced and that his consent was quite free (*s*). This class of cases is exemplified in the relation of solicitor and client (*t*), parent, or other person

Examples of relations where influence is presumed.

(*o*) See previous note; *Dent* v. *Bennett*, 4 My. & Cr. 269, 277, 279; Lord Kingsdown, *Smith* v. *Kay*, 7 H. L. C. 750, 779; *Williams* v. *Bayley*, L. R. 1 H. L. 200, 212, 219; Lord Penzance, *Parfitt* v *Lawless*, L. R. 2 P. & M. 462, 468, 469; *Allcard* v. *Skinner*, 36 Ch. D. 145, 183-186, 190; *Morley* v. *Loughnan*, 1893, 1 Ch. 736, 751, 752.

(*p*) *Williams* v. *Bayley*, L. R. 1 H. L. 200.

(*q*) *Allcard* v. *Skinner*, 36 Ch. D. 145, 171, 181; *Morley* v. *Loughnan*, 1893, 1 Ch. 736, 751, 752.

(*r*) *Blackie* v. *Clark*, 15 Beav. 595; *Toker* v. *Toker*, 31 Beav. 629, 3 De G., J. & S. 487.

(*s*) *Gibson* v. *Jeyes*, 6 Ves. 266, 276; *Dent* v. *Bennett*, 4 My. & Cr. 269, 273; *Archer* v. *Hudson*, 7 Beav. 551, 560; *Lyon* v. *Home*, L. R. 6 Eq. 655, 681; *Parfitt* v. *Lawless*, L. R. 2 P. & M. 462, 468, 469; *Allcard* v. *Skinner*, 36 Ch. D. 145, 171, 181-185.

(*t*) *Gibson* v. *Jeyes*, 6 Ves. 266, 276-278; *Edwards* v. *Meyrick*, 2 Hare, 60, 68-70; *Holman* v. *Loynes*, 4 De G., M. & G. 270; *Savery* v. *King*, 5 H. L. C. 627, 656; *Spencer* v. *Topham*, 22 Beav. 573,

in loco parentis and child (*u*), guardian and ward (*x*), confessor or other spiritual adviser or religious superior and penitent or disciple (*y*), and doctor and patient (*z*). But the doctrine is not confined to any particular set of confidential relations. If any relation be established between the parties, of which the natural consequence would be that the one would come under the other's influence, the same rule applies, and the *onus* is on the party occupying the position of influence to prove that the other gave his unbiassed consent (*a*). It is enough, for instance, that one has taken upon himself or come to be the other's confidential adviser in business matters or the manager of his property (*b*). But there is no *presumption* of undue influence on the part of a husband in transactions between himself and his wife (*c*); though of course undue influence may in fact be exerted

The doctrine not confined to any particular set of relations.

Husband and wife.

577; *Gresley* v. *Mousley*, 4 De G. & J. 78; *Pisani* v. *A.-G. for Gibraltar*, L. R. 5 P. C. 516, 536; *Wright* v. *Carter*, 1903, 1 Ch. 27; *Moody* v. *Cox*, 1917, 2 Ch. 71; and see *Nocton* v. *Ashburton*, 1914, A. C. 932, as to a client's remedy against a solicitor advising him in breach of the solicitor's duty.

(*u*) *Archer* v. *Hudson*, 7 Beav. 551; *Harvey* v. *Mount*, 8 Beav. 439 (elder sister); *Hoghton* v. *Hoghton*, 15 Beav. 278, 299, 300; *Sharp* v. *Leach*, 31 Beav. 491 (brother with whom a sister was living); *Savery* v. *King*, 5 H. L. C. 627, 655; *Turner* v. *Collins*, L. R. 7 Ch. 329; *Kempson* v. *Ashbee*, L. R. 10 Ch. 15; *Bainbrigge* v. *Browne*, 18 Ch. D. 188; *Powell* v. *Powell*, 1900, 1 Ch. 243. As to the principles on which the Court acts in setting aside or upholding family settlements or resettlements made between father and son of the family estates or property, see *Hoghton* v. *Hoghton*, 15 Beav. 278, 298, 300 *sq.*; Hatherley, L. C., *Turner* v. *Collins*, L. R. 7 Ch. 329, 339; *Fane* v. *Fane*, L. R. 20 Eq. 698; *Hoblyn* v. *Hoblyn*, 41 Ch. D. 200.

(*x*) *Hatch* v. *Hatch*, 9 Ves. 292.

(*y*) *Nottidge* v. *Prince*, 2 Giff. 246; *Lyon* v. *Home*, L. R. 6 Eq. 655; *Allcard* v. *Skinner*, 36 Ch. D. 145; *Morley* v. *Loughnan*, 1893, 1 Ch. 736, 752.

(*z*) *Dent* v. *Bennett*, 4 My. & Cr. 269, 276; *Mitchell* v. *Homfray*, 8 Q. B. D. 587, 589.

(*a*) *Bridgeman* v. *Green*, 2 Ves. sen. 627, Wilm. 58; *Hunter* v. *Atkins*, 3 My. & K. 113, 136, 140, 141; *Dent* v. *Bennett*, 4 My. & Cr. 269, 277, 279; *Smith* v. *Kay*, 7 H. L. C. 750, 779; *Morley* v. *Loughnan*, 1893, 1 Ch. 736, 752.

(*b*) See *Huguenin* v. *Baseley*, 14 Ves. 273; *Hunter* v. *Atkins*, 3 My. & K. 113; *Tate* v. *Williamson*, L. R. 2 Ch. 55; *Morley* v. *Loughnan*, 1893, 1 Ch. 736, 752.

(*c*) *Grigby* v. *Cox*, 1 Ves. sen. 517, 518; *Nedby* v. *Nedby*, 5 De G. & Sm. 377; *Barron* v. *Willis*, 1899, 2 Ch. 578, 585 (reversed on the facts, 1902, A. C. 271); *Howes* v. *Bishop*, 1909, 2 K. B. 390. It has been held that a fiduciary relation of the kind above mentioned may exist between a man and the woman, whom he is engaged to marry; *Page* v. *Horne*, 11 Beav. 227; *Cobbett* v. *Brock*, 20 Beav. 524, 530; and in special circumstances between a man and a woman, with whom he has gone through a marriage ceremony, which is void, *but which she believes to be valid; Coulson* v. *Allison*, 2 De G., F. & J. 521; see *Farmer* v. *Farmer*, 1 H. L. C. 724, 752.

by a husband over his wife with respect to her making some contract intended to bind her (*d*). The equitable rules as to the avoidance of transactions induced by undue influence apply, not only to contracts and conveyances for value, but also (and of course more readily) to voluntary conveyances, settlements and gifts, when made *inter vivos* (*e*). But the presumption of undue influence from the establishment of a confidential relation between the parties has no application in the case of gifts by will; and to upset such a gift, it must be shown, not merely that the legatee solicited or put forward claims to the testator's bounty, but that the testator's volition to the contrary was overborne by the legatee's influence (*f*).

Voluntary conveyances.

Gifts by will.

It is on the ground of public policy that contracts and conveyances are presumed to be voidable by one party, if the other occupied a position of influence over him, or were under a duty of giving him advice (*g*). As regards this duty, the person on whom it is incumbent is bound to give the other as good advice in the matter of any contract or conveyance made between them as if the transaction were carried out with some third person and not with himself. The burthen is therefore laid on him of proving that the terms of any such contract or conveyance executed in his own favour are in all respects fair and reasonable; such, in fact, as a competent adviser, acting exclusively on behalf of the other party would reasonably advise him to accept (*h*). The duty of so advising a vendor or purchaser of land includes the duty of communicating to him any circumstance known to the person bound to advise and enhancing or depreciating the value of the property (*i*); and it

Undue influence presumed from confidential relation on the ground of public policy.

What the duty of advising another imports.

It includes the duty of communicating facts material to the value.

(*d*) See *Turnbull* v. *Duval*, 1902, A. C. 429, 432-435; *Chaplin & Co., Ltd.* v. *Brammall*, 1908, 1 K. B. 233; *Bank of Montreal* v. *Stuart*, 1911, A. C. 120.

(*e*) *Huguenin* v. *Baseley*, 14 Ves. 273; *Allcard* v. *Skinner*, 36 Ch. D. 145, 171, 181 *sq.*; and cases cited above, pp. 821, 822; and consider *Re Coomber*, 1911, 1 Ch. 174, 723.

(*f*) *Hindson* v. *Weatherill*, 5 De G., M. & G. 301; *Boyse* v. *Rossborough*, 6 H. L. C. 2, 49; *Walker* v. *Smith*, 29 Beav. 394; *Hall* v. *Hall*, L. R. 1 P. & M. 481; *Parfitt* v. *Lawless*, L. R. 2 P. & M. 462, 469, 470; *Baudains* v. *Richardson*, 1906, A. C. 169, 184, 185; *Craig* v. *Lamoureux*, 1920, A. C. 349.

(*g*) Above, pp. 821, n. (*t*), 822, n. (*a*).

(*h*) Above, p. 821, n. (*t*).

(*i*) See *Popham* v. *Brooke*, 5 Russ. 8; *Edwards* v. *Meyrick*, 2 Hare, 60, 68-70, 74, 75; *Holman* v. *Loynes*, 4 De G., M. & G. 270; *Moody* v. *Cox*, 1917, 2 Ch. 71. It was held in *Edwards* v. *Meyrick* that a purchase by a solicitor from his client was not avoided by the mere fact

Non-disclosure of these avoids the sale.

follows of course that the mere non-disclosure of any such circumstance is sufficient to avoid the sale (*k*). This principle is exemplified, not only in the case of a purchase by a solicitor from his client (*l*), but also where land is bought by the vendor's agent having the management of his property (*m*), or his steward (*n*), or any person who has undertaken to advise him as to his financial affairs (*o*); and where a share in a partnership business is bought from one partner by another, who knows, and is aware that he knows, more than the vendor about the partnership accounts (*p*). And it is further applicable in the case of a purchase by a trustee of his *cestui-que-trust's* interest in the trust property (*q*). Where a solicitor or other adviser purchases from his client for value, what he has to prove in order to maintain the transaction, is that the terms he gave were fair and reasonable, that is, as good as could have been obtained from any one else; he must also prove that the client was fully informed and that he advised the client as carefully as if he (the solicitor) were not the purchaser (*r*). But if these facts be made out, the circumstance that the client was not advised by a separate solicitor or adviser acting independently for him, will not of itself avoid the sale (*s*). But it appears that in such

Purchase by trustee from *cestui-que-trust.*

How far a solicitor buying from his client must see that the client has independent advice.

that he had not pointed out to his client, that it was possible that a railway might at some future time be made near the land sold, which would increase its value, no project for making such railway being then actually on foot. It is conceived that a solicitor purchasing from his client would not be justified in concealing from him any fact known to himself which would certainly tend to increase the value of the property, as that a project was actually on foot for making a railway through or near it; and it seems immaterial that the information was not acquired in the course of his employment as that client's solicitor, but from an entirely distinct source.

(*k*) *Tate* v. *Williamson,* L. R. 2 Ch. 55; *Moody* v. *Cox,* ubi sup.

(*l*) Above, p. 821; *Moody* v. *Cox,* ubi sup.

(*m*) *Cane* v. *Allen,* 2 Dow. 289, 294, 299; *Molony* v. *Kernan,* 2 Dr. & War. 31.

(*n*) *Selsey* v. *Rhoades,* 2 S. & S. 41, 49, 1 Bligh, N. S. 1.

(*o*) *Tate* v. *Williamson,* L. R. 2 Ch. 55.

(*p*) *Law* v. *Law,* 1905, 1 Ch. 140.

(*q*) *Expte. Lacey,* 6 Ves. 625, 626; *Coles* v. *Trecothick,* 9 Ves. 234, 247; *Denton* v. *Donner,* 23 Beav. 285, 290; *Luff* v. *Lord,* 34 Beav. 220, 227; Cairns, C., *Thomson* v. *Eastwood,* 2 App. Cas. 215, 236; *Plowright* v. *Lambert,* 52 L. T. 646; *Dougan* v. *Macpherson,* 1902, A. C. 197, 204. See below, Chap. XVII.

(*r*) *Edwards* v. *Meyrick,* 2 Hare, 60; *Spencer* v. *Topham,* 22 Beav. 573; *Pisani* v. *A.-G. for Gibraltar,* L. R. 5 P. C. 516; *Re Haslam and Hier Evans,* 1902, 2 Ch. 765, 770; and see cases cited above, n. (*q*), and *Cane* v. *Allen,* 2 Dow, 289.

(*s*) See cases cited in previous note. It is respectfully submitted that the *dictum* of Stirling, L. J., in *Wright* v. *Carter,* 1903, 1 Ch.

cases the solicitor's proper course is to insist that the client shall be so separately advised; and the fact, that he has not done this, will be weighed in connexion with the other evidence and so may tell against the validity of the sale (*t*). And a voluntary conveyance or gift by a client to his solicitor or in the solicitor's favour will not be upheld unless the client were actually so advised (*u*). If a solicitor or other adviser obtain information while acting as such with respect to some property of his client, and purchase the property at some time afterwards, when the relation between them has been severed, the sale is nevertheless voidable if the purchaser did not disclose the information in question (*x*). And this rule applies equally in the case of a purchase by a trustee from his *cestui-que-trust* (*y*).

Solicitor or adviser buying from client after the relation has been severed.

Trustee so buying from *cestui-que-trust*.

The following further examples may be given of the exercise of undue influence as a ground for setting aside a sale. They appear to fall principally within the first of the above-mentioned classes of cases (*z*); but in some of them we shall observe the like presumption of undue influence and shifting of the burthen of proof as occurs in the second class. They all illustrate the generality of the rule, that a contract or conveyance is voidable in equity whenever such pressure has been used by one party to induce the other to make it that the other was not a free agent in giving his consent. It will be noticed that in some instances the conduct of the party in fault amounted or approximated to fraud. A contract has been avoided where it was procured by giving the contractor to understand that, unless he made it, his son would be prosecuted for forgery (*a*). A

Examples of the exercise of undue influence.

Williams v. *Bayley.*

27, 60, that independent advice is necessary to uphold the sale, was uttered inadvertently, and that the right rule is laid down by the same learned judge in *Re Haslam and Hier Evans*, ubi sup.

(*t*) See *Harrison* v. *Guest*, 6 De G., M. & G. 424, 432; *Barnard* v. *Hunter*, 2 Jur. N. S. 1213; *Denton* v. *Donner*, 23 Beav. 285, 291; *Pisani* v. *A.-G. for Gibraltar*, L. R. 5 P. C. 516, 540; *Nocton* v. *Ashburton*, 1914, A. C. 932, 969.

(*u*) *Rhodes* v. *Bate*, L. R. 1 Ch. 252; *Liles* v. *Terry*, 1895, 2 Q. B. 679; *Barron* v. *Willis*, 1900, 2 Ch. 121, affirmed, 1902, A. C. 271; *Wright* v. *Carter*, 1903, 1 Ch. 27; *Lloyd* v. *Coote*, 1915, 1 K. B. 242, 247, 248.

(*x*) *Carter* v. *Palmer*, 8 Cl. & Fin. 657, 705 *sq.*; *Holman* v. *Loynes*, 4 De G., M. & G. 270; *Luddy's Trustee* v. *Peard*, 33 Ch. D. 500, 517-520.

(*y*) See cases cited above, p. 821, n. (*t*); *Clark* v. *Clark*, 9 App. Cas. 733, 737; *Re Boles and British Land Co.'s Contract*, 1902, 1 Ch. 244, 247; below, Chap. XVII.

(*z*) Above, p. 821.

(*a*) *Williams* v. *Bayley*, L. R. 1 H. L. 200; see also *Kaufman* v. *Gerson*, 1904, 1 K. B. 591.

Ellis v. *Barker.*

conveyance was set aside, which had been made under pressure of the threat of preventing the grantor from being accepted as tenant of a farm; this being a necessary condition of taking a benefit under his father's will (*b*). A sale of land was rescinded where it had been obtained by three brothers from their eldest brother without adequate consideration, when he was under pressure for want of money, ignorant of his rights, and either without legal advice, or with advice meant to promote the interests of those with whom he was dealing. The eldest brother was in fact entitled to the whole of the land as tenant in tail, but supposed that he was only entitled to one-fourth of it; the others were aware of the true facts (*c*). So a sale will be set aside where there were such circumstances of inequality in the contracting parties' position and unfairness in the terms of the bargain that the only reasonable inference is that the one took advantage of the other's position to influence his will (*d*). Thus a sale of land obtained at a great undervalue from an aged, illiterate and weak-minded man was avoided by his heir after his death (*e*); and so was a sale made by a poor and illiterate man on terms very disadvantageous to him in his last illness and without any independent advice (*f*). And in several other cases Courts of Equity have set aside sales made at an undervalue by persons in a humble condition of life unacquainted or imperfectly acquainted with their rights or with the value of the property and acting without independent advice (*g*). So, sales of an equity of redemption made by the mortgagor to the mortgagee have been avoided where there was pressure put upon the mortgagor to sell and inequality of position, coupled with undervalue (*h*); although there is no general rule, which prohibits a mortgagee from buying the equity of redemption (*i*). Where such circumstances as above mentioned of inequality of

Sturge v. *Sturge.*

Inequality of position between the parties, coupled with unfairness.

Longmate v. *Ledger.*

Clark v. *Malpas.*

(*b*) *Ellis* v. *Barker,* L. R. 7 Ch. 104.

(*c*) *Sturge* v. *Sturge,* 12 Beav. 229, 245; see also *Dunnage* v. *White,* 1 Swanst. 137, 151.

(*d*) *Evans* v. *Llewellin,* 1 Cox, 333, 340; *Wood* v. *Abrey,* 3 Madd. 417, 423.

(*e*) *Longmate* v. *Ledger,* 2 Giff. 157; affirmed, see 4 De G., F. & J. 402.

(*f*) *Clark* v. *Malpas,* 4 De G., F. & J. 401.

(*g*) *Wood* v. *Abrey,* 3 Madd. 417; *Baker* v. *Monk,* 33 Beav. 419, 4 De G., J. & S. 388; *Fry* v. *Lane,* 40 Ch. D. 312, 321, 322; *James* v. *Kerr,* ib. 449, 460; *Rees* v. *De Bernardy,* 1896, 2 Ch. 437, 445.

(*h*) *Ford* v. *Olden,* L. R. 3 Eq. 461; *Prees* v. *Coke,* L. R. 6 Ch. 645.

(*i*) *Knight* v. *Marjoribanks,* 2 Mac. & G. 10, 13, 14; *Melbourne Banking Corpn.* v. *Brougham,* 7 App. Cas. 307, 315; above, p. 462, n. (*r*).

position and absence of independent advice are shown, the burthen of proof is shifted, as in the case of the establishment of a confidential relation (*k*); and it then lies on the person, who took the benefit of the sale, to make out that the terms of the transaction were in fact fair and reasonable and the other party acted freely in accepting them (*l*).

Inequality of position alone is not sufficient.

It will be observed that in all the above-mentioned cases of inequality of position between a buyer and a seller, the inadequacy of the consideration given for the sale has been a material reason for setting aside the sale. A contract of sale is not voidable merely on the ground that the parties occupied unequal positions, as that the buyer was rich and well advised and the seller was poor or in a humble way of life, or old and ill, and had no independent legal advice (*m*); although it appears that these circumstances are sufficient to cast upon the buyer the burthen of proof of fairness (*n*). In the same way, inadequacy of consideration is not of itself alone a ground for avoiding a sale; and further, if no more be proved than this, it does not appear that the party challenged is obliged to establish the fairness of his bargain (*o*). The rule of equity in this respect accords with the rule of law (*p*) and leaves the parties at liberty, if they be of full legal capacity and no constraint be put upon their wills, to make what bargain they please between themselves (*q*). But the fact, that a sale was at an undervalue, is evidence from which it may be inferred that the party thereby benefited was guilty of fraud or undue influence; and where it is sought to set aside a sale on these grounds the inadequacy of the consideration given may possibly be so gross as to leave room for no other inference than that the bargain was obtained

Inadequacy of consideration alone is not sufficient.

(*k*) Above, pp. 821, 822.

(*l*) *Baker* v. *Monk*, ubi sup.; *Prees* v. *Coke*, L. R. 6 Ch. 645, 649; *Fry* v. *Lane*, 40 Ch. D. 312, 322; and other cases cited in notes (*e*), (*f*), (*g*), above, p. 826.

(*m*) *Harrison* v. *Guest*, 6 De G., M. & G. 424, 432, 433, affirmed, 8 H. L. C. 481; *Rosher* v. *Williams*, L. R. 20 Eq. 210, 213, 217.

(*n*) Above, n. (*l*).

(*o*) *Griffith* v. *Spratley*, 1 Cox, 383; *Peacock* v. *Evans*, 16 Ves. 512, 517; *Wood* v. *Abrey*, 3 Madd. 417, 423; *Stilwell* v. *Wilkins*, Jac. 280, 282; *Cockell* v. *Taylor*, 15 Beav. 103, 115; *Harrison* v. *Guest*, ubi sup.

(*p*) Litt. s. 344; *Sturlyn* v. *Albany*, Cro. Eliz. 67; *Bolton* v. *Madden*, L. R. 9 Q. B. 55, 57; *Carlill* v. *Carbolic Smoke Ball Co.*, 1893, 1 Q. B. 256, 264, 271, 275.

(*q*) See n. (*o*), above.

Inadequacy of consideration alone no ground for resisting specific performance.

by undue influence or fraud (*r*). It is also considered, according to the great preponderance of authority, that inadequacy of consideration is not of itself alone a good ground for resisting the specific performance of a contract for the sale of land (*s*). In this case, as in that of the rescission of the contract, undervalue is merely a matter of evidence to be weighed along with the other facts of the case. And notwithstanding that the specific performance of a contract may be refused on the ground of hardship or unfairness—reasons which are of no avail to support a claim to rescind the contract (*t*)—it is thought to be settled at the present day that, where the only evidence offered of hardship or unfairness is the inadequacy of the consideration, the Court will not withhold the remedy in question (*u*); unless the undervalue were so gross as to raise, when considered in connexion with the circumstances of the case, an irresistible inference of fraud or undue pressure (*x*).

Inadequacy of consideration on sale of a reversion.

An exception to the rule, that mere inadequacy of consideration is no reason for setting aside or resisting specific performance of a contract, was formerly admitted in the case of the sale by private contract of estates in remainder or reversion (*y*) or other reversionary property; where the *onus* was on the purchaser to prove that he had given the fair value of the thing sold (*z*). This exception formed one branch of the jurisdiction

(*r*) See *Gwynne* v. *Heaton*, 1 Bro. C. C. 1, 9; *Underhill* v. *Horwood*, 10 Ves. 209, 219; *Stilwell* v. *Wilkins*, Jac. 280, 282; *Rice* v. *Gordon*, 11 Beav. 265, 270; *Summers* v. *Griffiths*, 35 Beav. 27, 33; Lord Westbury, *Tennent* v. *Tennents*, L. R. 2 Sc. App. 6, 9.

(*s*) *Collier* v. *Brown*, 1 Cox, 428; *White* v. *Damon*, 7 Ves. 30, 35; *Coles* v. *Trecothick*, 9 Ves. 234, 246; *Burrowes* v. *Lock*, 10 Ves. 470, 474; *Western* v. *Russell*, 3 V. & B. 187, 193; *Borell* v. *Dann*, 2 Hare, 440, 450; *Abbott* v. *Sworder*, 4 De G. & Sm. 448; *Haywood* v. *Cope*, 25 Beav. 140, 153. Earlier cases had proceeded on the ground that inadequacy of consideration alone *was* a sufficient ground for refusing to enforce specific performance; *Young* v. *Clerk*, Prec. Ch. 538; *Savile* v. *Savile*, 1 P. W. 745; *Day* v. *Newman*, 2 Cox, 77; and the earlier rule was re-asserted by Kindersley, V.-C., in *Falcke* v. *Gray*, 4 Drew. 651: but this case is said by Sir Edward Fry, Sp. Perf. § 445, 3rd ed., to break the current of the later authority.

(*t*) Above, pp. 758, 765.

(*u*) Fry, Sp. Perf. § 446, 3rd ed.

(*x*) See notes (*r*), (*s*), above.

(*y*) Not of course including remainders or reversions expectant only on a lease at a profitable rent.

(*z*) *Peacock* v. *Evans*, 16 Ves. 512; *Gowland* v. *De Faria*, 17 Ves. 20; *Hincksman* v. *Smith*, 3 Russ. 433; *Kendall* v. *Beckett*, 2 Russ. & My. 88, 90. This doctrine was not applied where the reversion was sold by public auction; *Shelly* v. *Nash*, 3 Madd. 232; nor where the

of the Courts of Equity to set aside catching bargains made with expectant heirs or persons in a similar position (*a*). The exception was, as we have seen (*b*), abolished by statute as from the 1st of January, 1868; since when no purchase made *bonâ fide*, and without fraud or unfair dealing, of any reversionary interest in real or personal estate is to be opened or set aside *merely on the ground of undervalue* (*c*). It is held that the effect of this statute is simply to place sales of reversionary property on the same footing, with respect to the liability of being avoided for mere inadequacy of consideration, as sales of property in possession; that the Act does not otherwise alter or affect the jurisdiction of the Court to set aside or revise catching bargains with expectant heirs or reversioners; and that undervalue is still a material element in cases where it is sought to set aside the sale of a reversion on other grounds than that of undervalue alone; as, for instance, where the claim is based on inequality of position and absence of legal advice, coupled with unfairness in the terms of the bargain (*d*).

Contracts induced by duress or undue influence voidable within the same limits as those induced by fraud.

Contracts to sell or buy land, which have been induced by duress or undue influence, are voidable at the option of the party coerced or unduly influenced in the same manner and within the same limits as contracts induced by fraud (*e*). Thus they may be set aside either before or after completion, at suit of the avoiding party's trustee in bankruptcy (*f*), or his representatives after his death (*g*), as well as himself; and against the representatives after death of the other party, and all persons claiming under the transaction so voidable either as volunteers affected by (*h*), or

reversion was sold together with the estate in possession whereon it was expectant; *Wood* v. *Abrey*, ib. 417; and see *Wardle* v. *Carter*, 7 Sim. 490.

(*a*) *Chesterfield* v. *Janssen*, 2 Ves. 125; 1 White & Tudor L. C. Eq. 303, 8th ed.

(*b*) Above, p. 392.

(*c*) Stat. 31 Vict. c. 4.

(*d*) *Aylesford* v. *Morris*, L. R. 8 Ch. 484, 490, 491; *O'Rorke* v. *Bolingbroke*, 2 App. Cas. 814, 822, 823, 833, 834; *Fry* v. *Lane*, 40 Ch. D. 312; *Brenchley* v. *Higgins*, 83 L. T. 751.

(*e*) Above, pp. 809 *sq.*

(*f*) *Ford* v. *Olden*, L. R. 3 Eq. 461.

(*g*) *Holman* v. *Loynes*, 4 De G., M. & G. 270; *Gresley* v. *Mousley*, 4 De G. & J. 78; *Plowright* v. *Lambert*, 52 L. T. 646. Where land has been sold under a contract voidable at the vendor's election for duress or undue influence, the option to set the transaction aside forms part of his real estate, as in the case of a similar contract voidable for fraud; above, p. 812; *Tomson* v. *Judge*, 3 Drew. 306.

(*h*) A voluntary settlement made in favour of several persons and

purchasers with notice of, the disabling fact (*i*). And they are equally unimpeachable against purchasers taking any interest in the land sold for value in good faith and without notice of that fact (*k*). Such contracts and conveyances may be affirmed either expressly or impliedly in the same manner as those induced by fraud (*l*); and long acquiescence therein may be evidence of an election to affirm them (*m*). But of course any such express confirmation must be quite free from all taint of the duress, undue influence or breach of duty which it is intended to condone (*n*); and it must not be made in ignorance of the party's right to set aside the original transaction; otherwise it will be equally voidable (*o*). Sales of land induced by duress or undue influence will be set aside, in general, on the like terms as those induced by fraud, the vendor returning the purchase money paid with interest and the purchaser giving up the land and the profits thereof received or derived by him (*p*), including an occupation rent for any land which has been in his own possession, having the like allowances made to him for necessary outgoings and

Terms of setting aside sales induced by duress or undue influence.

induced, as regards one of them and the interest taken by himself alone, by undue influence is not avoidable against the others; *Wright* v. *Carter*, 1903, 1 Ch. 27. But the case is different where a settlement is procured by the undue influence of one party in favour of himself and others, for whose benefit, as well as his own, the undue influence was exercised; see next note.

(*i*) *Huguenin* v. *Baseley*, 14 Ves. 273, 289; *Kempson* v. *Ashbee*, L. R. 10 Ch. 15; *Bainbrigge* v. *Browne*, 18 Ch. D. 188, 197; *Morley* v. *Loughnan*, 1893, 1 Ch. 736, 757.

(*k*) *Blackie* v. *Clark*, 15 Beav. 595; *Bainbrigge* v. *Browne*, 18 Ch. D. 188, 197.

(*l*) *Stump* v. *Gaby*, 2 De G., M. & G. 623; *Jarratt* v. *Aldam*, L. R. 9 Eq. 463.

(*m*) *Edwards* v. *Meyrick*, 2 Hare, 60, 75; *Wright* v. *Vanderplank*, 8 De G., M. & G. 133; *Allcard* v. *Skinner*, 36 Ch. D. 145, 187, 192, 193.

(*n*) *Baugh* v. *Price*, 1 Wils. (K. B.) 320; *Savery* v. *King*, 5 H. L. C. 627, 664; *Moxon* v. *Payne*, L. R. 8 Ch. 881, 885.

(*o*) *Baugh* v. *Price*, 1 Wils. (K. B.) 320, 322; *Kempson* v. *Ashbee*, L. R. 10 Ch. 15. It is conceived that there can be no doubt that, as a rule, knowledge of the party's rights is necessary to make an effectual confirmation. But in *Mitchell* v. *Homfray*, 8 Q. B. D. 587, it was in special circumstances held that a gift of money to a medical man by a patient was confirmed by the patient's deliberate assent thereto persisted in during several years after the relation between them had been severed, although it was not proved that the patient knew that the original gift was voidable. The ground on which this judgment really rests appears to be that such assent was equivalent to a new gift made at a time when there was no confidential relation between the parties to invalidate it. It may be noted that, as the chattels given were already in the donee's possession, nothing was required to make a new gift to him but the expression of the donor's intention to give: Wms. Pers. Prop. 73, 17th ed.

(*p*) Above, pp. 815-817.

substantial improvements and repairs, and being charged, where the relief is claimed against him, and in a proper case where the relief is claimed by him (*q*), with the loss caused by any acts of waste or deterioration, which he has committed (*r*). And the purchaser will not be required to account for the rents and profits on the footing of wilful default (*s*), unless a special case be made out against him (*t*), or unless he were guilty of a special breach of trust; as where he purchased when he was standing in a fiduciary relation to the vendor and concealed from the vendor some information which ought to have been communicated to him (*u*), or where the fiduciary relation was such as to incapacitate him altogether from purchasing the estate (*x*). It is thought that, where a sale is set aside for any undue influence not amounting to an actionable wrong, the party in fault is not liable to reimburse the other for any loss sustained in the nature of collateral damages and not attributable to any outlay incurred or act done in pursuance of the contract (*y*). But in the case of a sale induced by duress (such as false imprisonment, battery or menaces of loss of life or limb (*z*)), which amounts to an actual tort (*a*), it is conceived that the party so coerced can recover all damages attributable to the wrong, as in the case of fraud (*b*).

Whether purchaser accountable on the footing of wilful default.

(*q*) See above, pp. 811, 816, 817.
(*r*) *Expte. Hughes*, 6 Ves. 617, 624, 625; *Expte. James*, 8 Ves. 337, 351; *Expte. Bennett*, 10 Ves. 381, 400, 401; *Robinson* v. *Ridley*, 6 Madd. 2; *Longmate* v. *Ledger*, 2 Giff. 157; *Gresley* v. *Mousley*, 4 De G. & J. 78, 100-102.
(*s*) See previous note.
(*t*) Above, pp. 491, 817.
(*u*) *Tate* v. *Williamson*, L. R. 2 Ch. 55; Seton on Judgments, 2253, 7th ed.; *Plowright* v. *Lambert*, 52 L. T. 646.
(*x*) *Adams* v. *Sworder*, 2 De G., J. & S. 44; *Silkstone, &c. Co.* v. *Edey*, 1900, 1 Ch. 167; see below, Chap. XVII.
(*y*) See above, pp. 815, 816; and cases cited in note (*r*), above.
(*z*) Above, p. 820.
(*a*) 3 Black. Comm. 120, 127.
(*b*) Above, p. 816.

CHAPTER XV.

OF ILLEGALITY IN THE CONTRACT.

There must be nothing unlawful in the object of the agreement.

Sales for illegal purposes void.

Contract for sale of land including some unlawful term.

We have seen (*a*) that it is essential to the validity of a contract that there be nothing unlawful in the object of the agreement. A simple sale (*b*) of land is not in general affected by this condition: but there are some sales of land or other hereditaments which are expressly prohibited by statute (*c*); and a sale of land is void, if it be made for an illegal purpose (*d*). Again, if a contract for the sale of land include other terms besides the agreement to convey the land on payment of a price in money, and any such other term be illegal, the whole contract or the illegal part of it will be void, according as the lawful portion of the agreement be inseparable from the illegal part or not (*e*). And if the unlawful stipulation be a part of the consideration for the conveyance of the land or payment of the price, as the case may be, the whole contract will be void (*f*).

What contracts or stipulations are unlawful.

With regard to the question, what contracts or stipulations are unlawful, contracts for the sale of land are of course governed by the general law of contract (*g*). That can hardly be stated

(*a*) Above, p. 2. (*b*) Above, pp. 1, 251.

(*c*) See below, p. 833.

(*d*) *Lightfoot* v. *Tenant*, 1 B. & P. 551, 556; *Gas Light and Coke Co.* v. *Turner*, 6 Bing. N. C. 324; *Fisher* v. *Bridges*, 3 E. & B. 642; *Smith* v. *White*, L. R. 1 Eq. 626; *Pearce* v. *Brooks*, L. R. 1 Ex. 213; *Upfill* v. *Wright*, 1911, 1 K. B. 506; *Rees* v. *Bute*, 1916, 2 Ch. 64; *Horwood* v. *Millar's Timber, &c. Co., Ld.*, 1916, 2 K. B. 44, 1907, 1 K. B. 305; cf *Denny (Trustee of)* v. *Denny and Ware*, 1919, 1 K. B. 583.

(*e*) *Featherston* v. *Hutchinson*, Cro. Eliz. 199; *Bridge* v. *Cage*, Cro. Jac. 103; *Waite* v. *Jones*, 1 Bing. N. C. 656, 662; *Shackell* v. *Rosier*, 2 Bing. N. C. 634; *Keir* v. *Leeman*, 6 Q. B. 308, 322, 9 Q. B. 371, 395; *Hopkins* v. *Prescott*, 4 C. B. 578; *Lound* v. *Grimwade*, 39 Ch. D. 605, 613; and consider *Brooks, Bidlake & Whittal, Ltd.* v. *A.-G. for British Columbia*, 1923, W. N. 63.

(*f*) *Mallan* v. *May*, 11 M. & W. 653; *Price* v. *Green*, 16 M. & W. 346; *Nicholls* v. *Stretton*, 10 Q. B. 346; *Underwood* v. *Barker*, 1899, 1 Ch. 300.

(*g*) See Pollock on Contract, Ch. VIII., pp. 337 *sq.*, 9th ed.; Wms. Pers. Prop. 192 *sq.*, 17th ed.

in full in a treatise like the present: but some examples may be given. In the first place, some contracts are particularly prohibited by statute and are void on that account (*h*). Thus the sale by auction of an advowson apart from any manor or land was made unlawful by the Benefices Act, 1898 (*i*), and is therefore void. And the sale of any land by way of lottery is expressly prohibited and made void by statute (*j*). Other contracts are infected with illegality, not as being particularly prohibited, but because they infringe some rule of law. In this way, contracts for the sale of land are void if they contemplate the commission of any act, which is illegal by common law or statute; such as a crime, an indictable offence or a civil wrong (*k*), or an act *prohibited* by statute on pain of a penalty or otherwise (*l*). A sale of a house is therefore void if made to the knowledge of both parties with the object of using it for the purpose of manufacturing counterfeit coin or banknotes, or in any manner which is a common nuisance; as a brothel, for instance (*m*), or as a common gaming or betting house or a disorderly place of entertainment (*n*); or for the purpose of carrying on there any illegal process of manufacture (*o*) or business (*p*); or for the purpose of putting it up for sale by lottery (*q*). So a sale of land is void if part of the consideration be the publication of a libel (*r*) or the commission of a fraud on persons not parties to the contract (*s*), or an illegal transfer

Contracts particularly prohibited.

Sale by auction of an advowson alone.

Sale by way of lottery.

Contracts infringing some rule of law.

Contracts contemplating an illegal act.

(*h*) See *Whiteman* v. *Sadler*, 1910, A. C. 514, 525-527; above, p. 463.

(*i*) Above, p. 424.

(*j*) Stats. 10 & 11 Will. III. c. 17, s. 1; 12 Geo. II. c. 28, ss. 1, 4; *Fisher* v. *Bridges*, 3 E. & B. 642, 648.

(*k*) Co. Litt. 206b and n. (1); *Mitchel* v. *Reynolds*, 1 P. W. 181, 189; Bac. Abr. Conditions (K).

(*l*) *Bensley* v. *Bignold*, 5 B. & A. 335; *Cope* v. *Rowlands*, 2 M. & W. 149, 157; *Taylor* v. *Croyland Gas Co.*, 10 Ex. 293; and see *Booth* v. *Bank of England*, 7 Cl. & Fin. 509, 540.

(*m*) *Lloyd* v. *Johnson*, 1 B. & P. 340, 341; *Smith* v. *White*, L. R. 1 Eq. 626; *Pearce* v. *Brooks*, L. R. 1 Ex. 213; *Upfill* v. *Wright*, 1911, 1 K. B. 506; and see above, p. 760.

(*n*) See Stephen, Digest of Criminal Law, Art. 197-207, 388, 408 *sq.*

(*o*) *Gas Light and Coke Co.* v. *Turner*, 6 Bing. N. C. 324.

(*p*) See *Cope* v. *Rowlands*, 2 M. & W. 149 (unlicensed broker); *Taylor* v. *Croyland Gas Co.*, 10 Ex. 293 (uncertificated conveyancer); *Davies* v. *Makuna*, 29 Ch. D. 596 (unqualified medical practitioner).

(*q*) *Fisher* v. *Bridges*, 3 E. & B. 642; see above.

(*r*) *Shackell* v. *Rosier*, 2 Bing. N. C. 634.

(*s*) *Mallalieu* v. *Hodgson*, 16 Q. B. 689; *Begbie* v. *Phosphate Sewage Co.*, L. R. 10 Q. B. 491, 499; *Scott* v. *Brown & Co.*, 1892, 2 Q. B. 724; *Re Myers*, 1908, 1 K. B. 941, 943.

of a public office (*t*), or any stipulation which is illegal as tending to encourage immorality (*u*) or as being against the policy of the law (*v*). Such are stipulations for future cohabitation (without marriage) between a man and a woman (*x*), or for stifling a criminal prosecution (*y*) for some offence, which cannot be the subject of an action for damages, or is an offence against the public (*z*); and stipulations in general restraint of marriage (*a*). And it is thought that stipulations, which are in general or unlimited restraint of alienation, are of the same kind (*b*). Here it may be mentioned that stipulations in unreasonable restraint of trade are *void* as being against the policy of the law (*c*): but they are not unlawful (*d*). If, therefore, such a

Stipulations in unreasonable restraint of trade.

(*t*) *Hopkins* v. *Prescott,* 4 C. B. 578. See Benjamin on Sales, 415, 437, 2nd ed.

(*u*) *Upfill* v. *Wright,* 1911, 1 K. B. 506.

(*v*) See *Egerton* v. *Brownlow,* 4 H. L. C. 1, 123-125, 160, 195; *Montefiore* v. *Munday Motor Component Co., Ltd.,* 1918, 2 K. B. 241; and cf. *Re Wallace, Champion* v. *Wallace,* 1920, 2 Ch. 274.

(*x*) *Walker* v. *Perkins,* 1 W. Black. 517; *Gray* v. *Mathias,* 5 Ves. 286.

(*y*) *Collins* v. *Blantern,* 2 Wils. 341; 1 Smith, L. C.; *Williams* v. *Bayley,* L. R. 1 H. L. 200, 213, 240; *Lound* v. *Grimwade,* 39 Ch. D. 605.

(*z*) *Keir* v. *Leeman,* 6 Q. B. 308, 321, 9 Q. B. 371, 395; *Fisher* v. *Apollinaris Co.,* L. R. 10 Ch. 297; *Expte. Wolverhampton, &c. Banking Co.,* 14 Q. B. D. 32; *Windhill Local Board* v. *Vint,* 45 Ch. D. 351; *Jones* v *Merionethshire, &c. Bdg. Socy.,* 1892, 1 Ch. 173.

(*a*) *Lowe* v. *Peers,* 4 Burr. 2225. As to conditions in general restraint of marriage, see an article by the writer in L. Q. R. xii. 36.

(*b*) Parke, B., *Egerton* v. *Brownlow,* 4 H. L. C. 1, 125; *Hope* v. *Gloucester Corpn.,* 7 De G., M. & G. 647; *Re Quin,* 8 Ir. Ch. 578; *Billing* v. *Welch,* I. R. 6 C. L. 88, 201; *McLean* v. *McKay,* L. R. 5 P. C. 327, 334, 335; Pearson, J., *Re Rosher,* 26 Ch. D. 801, 810, 811, 819, 820; Chitty, J., *Re Elliot,* 1896, 2 Ch. 353, 356; but see Co. Litt. 206 b, and Mr. Smith's criticism thereon, 1 Smith, L. C. 185, 2nd ed.; 490, 12th ed. These authorities are all stated and discussed by the author in 51 Sol. J. 648, 650, 669, 670, in an article criticising the decision of Warrington, J., in *Worthing Corpn.* v. *Heather,* 1906, 2 Ch. 532; see also other articles by the author in 42 Sol. J. 628, 650, and 54 Sol. J. 501, 502, the latter criticising the decision in *South Eastern Ry. Co.* v. *Associated Portland, &c. Ltd.,* 1910, 1 Ch. 12. In these articles it is submitted that contracts to make some conveyance, which if actually made by way of shifting use or other executory limitation would be void as breaking the rule against perpetuities, are in general or unlimited restraint of alienation and should on that account be held to be void; see above, pp. 358, 359, and notes (*y*), (*z*).

(*c*) See *Maxim, &c. Co.* v. *Nordenfelt,* 1893, 1 Ch. 630, 1894, A. C. 535; *Ehrman* v. *Bartholomew,* 1898, 1 Ch. 671; *Underwood* v. *Barker,* 1899, 1 Ch. 30; *Townsend* v. *Jarman,* 1900, 2 Ch. 698, 702; *Dowden* v. *Pook,* 1904, 1 K. B. 45.

(*d*) *Mallan* v. *May,* 11 M. & W. 653, 669; *Green* v. *Price,* 13 M. & W. 695, 699; affirmed, 16 M. & W. 346, 353; and cases cited in previous note; Benjamin on Sale, 408, 2nd ed.

stipulation form part of the consideration for a sale of land, and the valid part of the contract be not dependent on the enforcement of the invalid stipulation (*e*), so that the stipulations forming the consideration are severable, the sale will not be avoided (*d*). But if the invalid stipulation be such an integral part of the consideration that its performance is a condition precedent to the enforcement by the party, who had engaged to fulfil it, of the other party's obligation under the contract (*e*), it appears that the sale will be void (*f*). Contracts to buy or sell land made with the inhabitants of hostile states are void, unless entered into with the king's licence. For except by royal licence all intercourse, whether commercial or not, which is inconsistent with a state of war (*g*), is prohibited between the king's subjects and the inhabitants of an enemy's country (*h*). And this rule applies, not only to aliens, but to all persons, even to British subjects, residing in a hostile state, who are adherent to the king's enemies by carrying on business there or otherwise (*i*).

Contracts made with the inhabitants of hostile states.

Sales of land are also void if they involve the offence of maintenance or champerty, or infringe the principle of legal policy on which those offences are founded, and which is intended to prevent the multiplication or stirring up of lawsuits (*k*). Here it may be mentioned that at common law, if a man were disseised

Sales involving maintenance or champerty.

Sale of a right of entry or action to recover land.

(*d*) See note (*d*) on opposite page; cf. above, p. 832 and n. (*e*).

(*e*) See above, pp. 792, 793, 832.

(*f*) See *Attwood* v. *Lamont*, 1920, 3 K. B. 571, 577, 593-596; *British Concrete Co.* v. *Schleff*, 1921, 2 Ch. 563, where note that the sale had been completed. It appears from these authorities that a stipulation, whereof part is in unreasonable restraint of trade, may be severable, so far as it is regarded as part of the consideration for a sale of land or other property, but yet not severable as regards its enforcement against the person intended to be bound thereby.

(*g*) *Robson* v. *Premier Oil and Pipe Line Co., Ld.*, 1915, 2 Ch. 124, 136; *Ertel, Bieber & Co.* v. *Rio Tinto Co.*, 1918, A. C. 260, 268.

(*h*) See *Esposito* v. *Bowden*, 7 E. & B. 763, 779; *Janson* v. *Driefontein, &c.*, 1902, A. C. 484, 489, 502, 509; *Ertel, Bieber & Co.* v. *Rio Tinto Co.*, 1918, A. C. 260; *Zinc Corpn., Ltd.* v. *Hirsch*, 1916, 1 K. B. 541; *Naylor, Benzon & Co., Ld.* v. *Krainische Industrie Gesellschaft*, 1918, 1 K. B. 331, 334, 337, 2 K. B. 486; below, Chap. XVI. § 5, under the head of Aliens.

(*i*) *M'Connell* v. *Hector*, 3 B. & P. 113; *Roberts* v. *Hardy*, 3 M. & S. 533; *Albretcht* v. *Sussmann*, 2 V. & B. 323; *Janson* v. *Driefontein*, 1902, A. C. 484, 505, 506; *The Lützow*, 1918, A. C. 435, 438, 439.

(*k*) *Reynell* v. *Sprye*, 1 De G., M. & G. 660, 677, 686; *Sprye* v. *Porter*, 7 E. & B. 58; *Hilton* v. *Woods*, L. R. 4 Eq. 432, 439; *Hutley* v. *Hutley*, L. R. 8 Q. B. 112; *James* v. *Kerr*, 40 Ch. D. 449, 456; *Rees* v. *De Bernardy*, 1896, 2 Ch. 437, 446; *Lampet's case*, 10 Rep. 46b, 48a; Co. Litt. 214a, 265a, n. (1); *Stanley* v. *Jones*, 7 Bing. 369, 377.

of his freehold or wrongfully ejected from his leasehold land, he could not afterwards sell or dispose of his interest therein; for he was then divested of his *estate* (*l*), and had only a right of entry on the land or a right of action to recover it according to the circumstances of the case (*m*), and neither of these rights was assignable (*n*). By the Statute of Bracery (*o*) the sale was prohibited of any "pretenced rights or titles" to or in any hereditaments, unless the vendor or his predecessors in title had been in possession of the same or the reversion or remainder thereof, or in receipt of the rents and profits thereof for one whole year next before the sale was made; and any promise or covenant to have any such (*p*) right or title was equally forbidden unless the promissor or covenantor, or his predecessors, had been so in possession for a year before the contract (*q*). But persons in lawful possession of any hereditaments were permitted to buy or contract for the pretenced right or title thereto of any other person (*r*). It was considered that, if a man were wrongfully held out of possession, his right of entry or action was a pretenced right or title within the meaning of this Act, notwithstanding that his claim were lawful (*s*). And it appears that such a right was not assignable in equity by way of contract dealing with it for value (*t*), according to the equitable rule established in the case of *possibilities* not assignable at

Sale of pretenced right or title.

(*l*) Litt. §§ 450, 451, 455; Co. Litt. 214a, 266a, 267a, 345, 369a, 374b; *Goodright* v. *Forrester*, 8 East, 552, 566-568; 2 Prest. Abst. 388 *sq.*; *Culley* v. *Doe* d. *Taylerson*, 11 A. & E. 1008, 1020.

(*m*) See 3 Black. Comm. 174 *sq.*; Wms. Real Prop. 157, 23rd ed.; L. Q. R. x. 227, 229, 230.

(*n*) Not even, before the Wills Act, by will; above, n. (*m*); 2 Prest. Abst. 419, 420. Rights of entry are now devisable under the Wills Act, stat. 7 Will. IV. & 1 Vict. c. 26, s. 3; and see above, p. 812. The right of a copyholder wrongfully ejected was equally unassignable; *Kite and Queinton's case*, 4 Rep. 25, 26.

(*o*) Stat. 32 Hen. VIII. c. 9, s. 2, now repealed by stat. 60 & 61 Vict. c. 65, s. 11.

(*p*) See *Jenkins* v. *Jones*, 9 Q. B. D. 128, 134.

(*q*) It was held that this Act did not prevent the sale, pending the completion of a contract for the sale of land, of the purchaser's interest in the land sold; *Wood* v. *Griffith*, 1 Swanst. 43, 55, 56; Sug. V. & P. 356; or the sale by an expectant devisee of his interest under the expected devise; *Cook* v. *Field*, 15 Q. B. 460, 471.

(*r*) Stat. 32 Hen. VIII. c. 9, s. 4.

(*s*) Plowd. 87, 88; *Doe* d. *Williams* v. *Evans*, 1 C. B. 717; *Jenkins* v. *Jones*, 9 Q. B. D. 128, 134, 135; *Kennedy* v. *Lyell*, 15 Q. B. D. 491, 495.

(*t*) *Wood* v. *Downes*, 18 Ves. 120; *Cholmondeley* v. *Clinton*, 2 J. & W. 1, 135, 136, 4 Bligh, 1, 43-45, 75, 82; *Prosser* v. *Edmonds*, 1 Y. & C. 481, 496-499.

law (*u*). By the Real Property Act, 1845 (*x*), a right of entry such as we are considering was made assignable by deed. It was held that, since that Act, a lawful right of entry could no longer be properly described as a pretenced right or title, and might well be sold, not only to the person in possession, but to any stranger (*y*). And now, as we have seen (*z*), the enactment prohibiting the sale of pretenced rights and titles has been repealed. Under the present law, therefore, a man may lawfully sell his interest in any land, of which he is wrongfully kept out of possession. And it appears that he may lawfully sell a part of his interest in such land, so long as it be no part of the bargain that the purchaser shall maintain or assist him in his suit to recover the land (*a*). The law of champerty, moreover, does not prohibit the sale *pendente lite* of any property, which is the subject of an action to recover or realise it, notwithstanding that the purchaser be empowered to sue in the vendor's name and agree to indemnify him against the past and future costs of the litigation (*b*). And it seems to be equally lawful to sell a part of such property, if there be no agreement to maintain the vendor in his suit to recover the rest (*c*). There is an exception, however, in the case of the solicitor acting in the litigation, who cannot lawfully purchase the thing sued for from his client while the action is pending (*d*); though he is permitted to take

(*u*) See *Wright* v. *Wright,* 1 Ves. sen. 409, 411; 2 Prest. Abst. 204, 205.

(*x*) Stat. 8 & 9 Vict. c. 106, s. 6; held not to extend to right or title of entry upon a forfeiture for condition broken; *Hunt* v. *Bishop,* 8 Ex. 675, 680; *Hunt* v. *Remnant,* 9 Ex. 635, 640; *Crane* v. *Batten,* 2 Comm. Law Rep. 1696, 23 L. T. O. S. 220; Wms. on Seisin, 125; *Jenkins* v. *Jones,* 9 Q. B. D. 128, 131; but as to a right of entry for breach of covenant or condition in a lease, see now Conveyancing Act, 1911, 1 & 2 Geo. V. c. 37, s. 2; above, p. 388.

(*y*) *Jenkins* v. *Jones,* 9 Q. B. D. 128; *Kennedy* v. *Lyell,* 15 Q. B. D. 491, 496.

(*z*) Above, p. 836, n. (*o*).

(*a*) *Sprye* v. *Porter,* 7 E. & B. 58; *Rees* v. *De Bernardy,* 1896, 2 Ch. 437, 446, 447.

(*b*) *Wood* v. *Griffith,* 1 Swanst. 43, 56; *Hartley* v. *Russell,* 2 S. & S. 244; *Harrington* v. *Long,* 2 My. & K. 590; *Hunter* v. *Daniel,* 4 Hare, 420, 430; *Cockell* v. *Taylor,* 15 Beav. 103, 117; *Knight* v. *Bowyer,* 2 De G. & J. 421, 443-445; *Myers* v. *United, &c. Co.,* 7 De G., M. & G. 112; *James* v. *Kerr,* 40 Ch. D. 449, 456, 457.

(*c*) Above, n. (*b*); and see *Anderson* v. *Ratcliffe,* E. B. & E. 806. As to the question, how far this doctrine is applicable to an action to recover damages for a wrong, see Wms. Pers. Prop. 169, 17th ed.; and an article by the writer in L. Q. R. x. 143, 147 *sq.;* above, p. 814.

(*d*) *Simpson* v. *Lamb,* 7 E. & B. 84.

a mortgage or charge thereon by way of security for a loan (*e*).

Sales made void or unenforceable, but not prohibited.

Again, some contracts are made void or are rendered unenforceable by statute, though not prohibited. Of this kind are contracts made by way of gaming or wagering (*f*); and if any contract for the sale of land be so made, it will be void accordingly (*g*). So we have seen that contracts for the sale of land are not enforceable unless put into writing and signed by the party to be charged or his agent (*h*).

Illegal contracts are void.

Property transferred thereunder cannot be recovered back.

Illegal contracts are altogether void; no proceedings can be maintained thereon at law or in equity; and if either party sue the other in respect thereof, the latter is at liberty to plead the illegality of the agreement as a defence (*i*). It follows that if an illegal contract be wholly or partly executed, no action can, as a rule, be maintained to recover any money paid or property transferred thereunder (*i*). Thus if land be sold for an illegal purpose and the contract be completed, the vendor cannot afterwards recover the land, nor the purchaser the price; if the purchaser pay the whole or any part of the price to the vendor before the land be conveyed to him, the vendor may plead

(*e*) *Anderson* v. *Radcliffe*, E. B. & E. 806.

(*f*) Stat. 8 & 9 Vict. c. 109, s. 18; *Hyams* v. *Stuart King*, 1908, 2 K. B. 696; and as to recovery of money paid by cheque for gaming debts, see *Dey* v. *Mayo*, 1920, 2 K. B. 346; *Sutters* v. *Briggs*, 1922, 1 A. C. 1; Gaming Act, 1922, 12 Geo. V. c. 19.

(*g*) Consider *Rourke* v. *Short*, 5 E. & B. 904; *Re Gieve*, 1899, 1 Q. B. 794.

(*h*) Above, pp. 3-13.

(*i*) See *Collins* v. *Blantern*, 2 Wils. 341; *Holman* v. *Johnson*, 1 Cowp. 341; cases cited above, p. 832, n. (*d*); *Taylor* v. *Chester*, L. R. 4 Q. B. 309; *Ayerst* v. *Jenkins*, L. R. 16 Eq. 275; *Herman* v. *Jeuchner*, 15 Q. B. D. 561; *Kearley* v. *Thomson*, 24 Q. B. D. 742; *Scott* v. *Brown & Co.*, 1892, 2 Q. B. 724; *Gedge* v. *Royal Exchange Ass. Corp.*, 1900, 2 Q. B. 214; *Harse* v. *Pearl, &c. Co.*, 1904, 1 K. B. 558; *Re Myers*, 1908, 1 K. B. 941; *Re Robinson's Settlement*, 1912, 1 Ch. 717; *Lougher* v. *Molyneux*, 1916, 1 K. B. 718; *Montefiore* v. *Munday Motor Components Co., Ld.*, 1918, 2 K. B. 241; *Brightman & Co., Ltd.* v. *Tate*, 1919, 1 K. B. 463; *Re Mahmoud and Ispahani*, 1921, 2 K. B. 716; *Rees* v. *Bute*, 1916, 2 Ch. 64, where the parties had innocently entered into a contract for a lease, in ignorance of an Act of Parliament just passed, which made the contract illegal, and an action brought by the intending tenant, before taking possession under the contract, for specific performance or damages in lieu thereof, was dismissed and the intending lessor was relieved from his liability under the contract on the terms, *which he offered*, of repaying the deposit, and certain costs paid by the tenant, and the costs of the action were arranged.

the illegality of the agreement as a bar to any action by the purchaser either to compel conveyance or recover the money paid (*k*); and if the vendor convey the land without payment, he cannot get it back, or enforce payment of the price, either directly, or indirectly by suing upon any bond, covenant or note given to secure such payment (*l*). Here it may be mentioned that, where land is purchased in order to be used for an illegal purpose, the contract is only void if such purpose be known to both parties to the sale (*m*). If one contract to buy land, intending to use it for an illegal purpose but without disclosing this intention to the vendor, the purchaser cannot in this case allege his own unlawful intent in order to avoid the contract (*n*); and the contract is enforceable by the vendor. And it seems that this is equally the case, although the vendor may suspect that the purchaser intends to put the property to an unlawful use, so long as he is not actually aware of any definite intention so to use it (*o*). If the purchaser's unlawful purpose were at first unknown to the vendor, but the vendor afterwards became aware of it before completion, the contract is in effect voidable at the vendor's option; *he* may then plead the purchaser's illegal purpose as a bar to the enforcement of the contract (*p*): but the purchaser himself cannot do so.

Sale for illegal purposes known to both parties.

To one party only.

There are again certain exceptions to the rule that money paid or property delivered under an unlawful agreement cannot be recovered back. Thus if one who has paid money or delivered property under such an agreement repudiate his unlawful purpose before any part of it be accomplished, he may recover his property back; unless perhaps the object of the agreement were actually criminal or immoral (*q*). But this exception does not

Exceptions to the rule that property parted with under an illegal contract cannot be recovered.

(*k*) See last note.

(*l*) *Fisher* v. *Bridges*, 3 E. & B. 642. It appears that a lease granted under an illegal agreement, as for the land demised to be used for an unlawful purpose, and followed by the lessee's entry, cannot be set aside by the lessor during the term; notwithstanding that the lessor cannot sue for the rent or on the covenants in the lease; see *Doe* d. *Roberts* v. *Roberts*, 2 B. & A. 367; *Gas Light and Coke Co.* v. *Turner*, 6 Bing. N. C. 324, 327, 329; *Smith* v. *White*, L. R. 1 Eq. 626; *Upfill* v. *Wright*, 1911, 1 K. B. 506; cf. *Rees* v. *Bute*, 1916, 2 Ch. 64, 74; as to which see last note.

Lease granted under illegal agreement.

(*m*) See cases cited above, pp. 832, n. (*d*), 833.

(*n*) *Doe* d. *Roberts* v. *Roberts*, 2 B. & A. 367.

(*o*) See *Lloyd* v. *Johnson*, 1 B. & P. 340; *Pearce* v. *Brooks*, L. R. 1 Ex. 213.

(*p*) *Cowan* v. *Milbourn*, L. R. 2 Ex. 230.

(*q*) *Tappenden* v. *Randall*, 2 B. & P. 467; *Palyart* v. *Leckie*, 6

apply if the illegal purpose has been partly performed (*r*). And where one has made an unlawful bargain, which would (except for its illegality) be voidable by him, as if he were induced to enter into it by fraud, duress or undue influence, he may recover back any property transferred thereunder (*s*). Another exception to the rule is where it is sought to recover money paid or property transferred under a contract made void by some statute passed for the protection of a class of persons, of which the plaintiff is one (*t*). And money or property deposited with a stakeholder or other agent in order to be applied under an illegal contract may be recovered back, if notice not to part with it be given before it be actually delivered over in pursuance of the agreement (*u*).

Property transferred under void contracts.

Where a contract is not prohibited by law, but is merely made void (*x*), any money paid or property transferred thereunder is in general equally irrecoverable as in the case of a prohibited contract. For the rule is that money paid or property conveyed away with a full knowledge of the facts, though under a mistake of law, cannot be recovered back (*y*). And where an

M. & S. 290; *Taylor* v. *Bowers*, 1 Q. B. D. 291; see *Hermann* v. *Charlesworth*, 1905, 2 K. B. 123; *Rees* v. *Bute*, 1916, 2 Ch. 64; above, p. 838, n. (*i*).

(*r*) *Kearley* v. *Thomson*, 24 Q. B. D. 742; see *Hermann* v. *Charlesworth*, 1905, 2 K. B. 123; and cf. *Rees* v. *Bute*, 1916, 2 Ch. 64; above, p. 838, n. (*i*).

(*s*) *Osborne* v. *Williams*, 18 Ves. 379; *Reynell* v. *Sprye*, 1 De G., M. & G. 660, 679; *Atkinson* v. *Denby*, 6 H. & N. 778, 7 H. & N. 934; *Hughes* v. *Liverpool Victoria Legal Friendly Society*, 1916, 2 K. B. 482; and see *Harse* v. *Pearl, &c. Co.*, 1904, 1 K. B. 558, 563, 564; Pollock on Contract, 461-463, 9th ed.

(*t*) *Barclay* v. *Pearson*, 1893, 2 Ch. 154, 165-168; *Bonnard* v. *Dott*, 1906, 1 Ch. 740; *Chapman* v. *Michaelson*, 1908, 2 Ch. 612, 1909, 1 Ch. 238; cf. *Lodge* v. *National Union Investment Co., Ltd.*, 1907, 1 Ch. 300, where a plaintiff applying under the above exception for *equitable* relief in the way of recovery of property was put upon terms as a condition of having it restored to him. The three last cases relate to property mortgaged to an unregistered moneylender; see above, p. 463.

(*u*) *Hastelow* v. *Jackson*, 8 B. & C. 221; *Bone* v. *Ekless*, 5 H. & N. 925; *Barclay* v. *Pearson*, 1893, 2 Ch. 154, 168-170; *Strachan* v. *Universal Stock Exchange*, 1895, 2 Q. B. 329, 1896, A. C. 166; *Shoolbred* v. *Roberts*, 1899, 2 Q. B. 560, 1900, 2 Q. B. 497, 500; *Burge* v. *Ashley*, 1900, 1 Q. B. 744.

(*x*) Above, p. 838.

(*y*) *Bilbie* v. *Lumley*, 2 East, 469; *Brisbane* v. *Dacres*, 5 Taunt. 143; *Rogers* v. *Ingham*, 3 Ch. D. 351; *Kearley* v. *Thomson*, 24 Q. B. D. 742, 745; *Finck* v. *Tranter*, 1905, 1 K. B. 427; Cozens-Hardy, M. R., in *Baylis* v. *Bishop of London*, 1913, 1 Ch. 127, 133; *Sharp Bros. & Knight* v. *Chant*, 1917, 1 K. B. 771; *Re Hatch*, 1919, 1 Ch. 351; see

agreement is made which is not prohibited, but is binding in honour only and is void at law, the one party has in general no legal remedy if the other refuse to perform his part of the agreement after having received what was due to him thereunder (*z*). Thus contracts which are illegal merely because they are made void by statute stand in effect on the same footing as contracts which are prohibited. If therefore a void agreement be wholly or partly executed, the law will leave the parties in the position in which they stand, and will not lend its aid to undo what has actually been performed (*a*). But a party to a merely void contract is at liberty to repudiate it before it be performed, and if he do this, he may recover any money or property deposited with the other party as security for his carrying out the agreement (*b*). And property transferred to a stakeholder or other agent for the purpose of being applied under a merely void contract may be recovered back, if notice not to part with it be given before it be delivered over (*c*). Property transferred under a void agreement induced by misrepresentation or coercion may also be recovered; as gifts so induced are voidable (*d*). And if the contract were made void by a statute passed for the benefit of a certain class of persons, a member of the protected class may recover any property parted with in pursuance of the agreement (*e*).

Contracts unenforceable under the Statute of Frauds.

Contracts falling within the 4th section of the Statute of Frauds (*f*) are governed by rules peculiar to themselves as

also *Maskell* v. *Horner*, 1915, 3 K. B. 106; and see *Seymour* v. *Pickett*, 1905, 1 K. B. 715. There is an exception where money is paid under a mistake of law to an officer of the Court; *Exptp. Simmonds*, 16 Q. B. D. 308; *Re Opera, Ld.*, 1891, 2 Ch. 154; *Re Tyler*, 1907, 1 K. B. 865; *Re Thellusson*, 1919, 2 K. B. 735; cf. *Scranton's Trustee* v. *Pearce*, 1922, 2 Ch. 87.

(*z*) *Fisher* v. *Liverpool Marine Insce. Co.*, L. R. 8 Q. B. 469, 9 Q. B. 418; consider also *John Edwards & Co.* v. *Motor Union Insce. Co.*, 1922, 2 K. B. 249.

(*a*) *Manning* v. *Purcell*, 7 De G., M. & G. 55, 57, 63, 66; *Hampden* v. *Walsh*, 1 Q. B. D. 189, 192, 194; *Strachan* v. *Universal Stock Exchange* (No. 2), 1895, 2 Q. B. 697; see above, p. 838, n. (*f*).

(*b*) *Hampden* v. *Walsh*, 1 Q. B. D. 189, 192, 194; *Trimble* v. *Hill*, 5 App. Cas. 342; *Barclay* v. *Pearson*, 1893, 2 Ch. 154, 168; *Strachan* v. *Universal Stock Exchange*, 1895, 2 Q. B. 329; affirmed, 1896, A. C. 166; *Strachan* v. *Universal Stock Exchange* (No. 2), 1895, 2 Q. B. 697, 699, 702, 705, 706.

(*c*) See previous note; and *Diggle* v. *Higgs*, 2 Ex. D. 422.

(*d*) Above, p. 823; *Re Glubb*, 1900, 1 Ch. 354; and see *Harse* v. *Pearl, &c. Co.*, 1904, 1 K. B. 558; above, p. 840, n. (*s*).

(*e*) *Barclay* v. *Pearson*, 1893, 2 Ch. 154, 166-168; see above, p. 840, n. (*t*).

(*f*) Stat. 29 Car. II. c. 3; above, p. 3.

regards the recovery of money paid thereunder (*g*). In such cases the contract is not made void, but is merely rendered unenforceable (*h*); the law regards the *agreement* between the parties as good (though not perfectly binding), and deems its performance to be meritorious. Thus, if one buy land with notice of a prior oral sale to another, he has no equity against the other in case the oral sale be completed before he himself has obtained a conveyance (*i*). And delivery of possession upon an oral sale of land is a good consideration for a promissory note for the price (*k*). It is therefore held that, although there is in general no remedy by suing on the contract against a party who pleads the statute in bar (*l*), yet he is under an obligation *quasi ex contractu* to return money paid or to pay for work done under the agreement repudiated (*m*). Thus, if the whole purchase money be paid on an oral contract for the sale of land, and the vendor plead the statute as a defence to an action to enforce conveyance, the purchaser can recover the price (*n*). And where a deposit is paid on such a contract, the vendor pleading the statute is not at liberty to retain it (*o*). But the better opinion is that the purchaser repudiating the agreement under cover of the statute cannot recover the deposit from a vendor who is willing and able to complete the contract; for such a contract cannot be rescinded by either party at will, as an illegal or a void agreement may (*p*); and if one party, having paid a deposit with full knowledge that there was no writing to bind him, choose to take advantage of the Act while the other is desirous of performing the agreement, the law will not assist him to get back that payment (*q*).

Sale of land for the use of a charity.

It appears that, under the Mortmain Act of Geo. II. (*r*), a sale of land for the use of a charity was altogether void, unless carried out with the formalities prescribed by that Act (*s*). But

(*g*) See Pollock on Contract, 652, 7th ed. (*h*) Above, p. 10.
(*i*) *Dawson* v. *Ellis*, 1 J. & W. 524.
(*k*) *Jones* v. *Jones*, 6 M. & W. 84; and see *Lavery* v. *Turley*, 6 H. & N. 239.
(*l*) See above, pp. 10-20.
(*m*) See *Pulbrook* v. *Lawes*, 1 Q. B. D. 284.
(*n*) *Anon.*, 1 Freem. (K. B.) 486, case 664 b; Sug. V. & P. 153.
(*o*) *Gosbell* v. *Archer*, 2 A. & E. 500.
(*p*) Above, pp. 838, 840.
(*q*) *Thomas* v. *Brown*, 1 Q. B. D. 714, dissenting from *Casson* v. *Roberts*, 31 Beav. 613.
(*r*) Stat. 9 Geo. II. c. 36.
(*s*) Above, pp. 429 and n. (*n*), 436.

we have seen that, under the present Mortmain and Charitable Uses Acts of 1888 and 1891 (*t*), it is a question whether a contract to sell land to some charitable use is an *assurance* required to be made with the formalities prescribed by the Act of 1888, and therefore void, if not so made (*u*). There seems to be no doubt however that, where a sale of land to a charity is completed on payment of the purchase money by an assurance not made in compliance with these Acts, as by a deed attested by one witness only, the conveyance thereby purported to be effected is void, the assuror, if he has parted with possession, acquires a legal right of re-entry, and the purchaser has no right of action against him to recover the price (*x*). Where a man has contracted in good faith to buy land and pay for it with his own money, but directs the conveyance to be made to some charitable use, intending to give the land to the charity, and the conveyance is not made in accordance with the Mortmain Act, the assurance of the legal estate is void, and the charity has no equitable interest in the land; but in equity the land belongs to the purchaser, who has done nothing effectual to divest himself of the equitable estate which he acquired under the contract for sale (*y*).

Illegality supervening since the formation of the contract.

If the performance of a contract, which was valid in its inception, be rendered illegal by some event occurring after the formation, but before the completion of the agreement, the contract is dissolved, so far as it remains unperformed, and the parties' mutual obligations are discharged (*z*). And it appears that in such case the parties are placed in the like position as if their obligations were discharged for impossibility of performance (*a*); the law will not interfere to set aside anything actually

(*t*) Stats. 51 & 52 Vict. c. 42; 54 & 55 Vict. c. 73.

(*u*) Above, pp. 425-429, 435-437.

(*x*) See above, pp. 425-429 and notes (*c*), (*m*), (*n*), 435; *Thurstan* v. *Nottingham, &c. Bdg. Socy.*, 1902, 1 Ch. 1, 13, affirmed, 1903, A. C. 6, 10, 12; *Chapman* v. *Michaelson*, 1908, 2 Ch. 612, 620, 621, affirmed, 1909, 1 Ch. 238; and consider *Simpson* v. *Nicholls*, 3 M. & W. 240, 244, 5 M. & W. 702, and the American case of *Thompson* v. *Williams*, 58 N. H. 248, cited in Keener on Quasi-Contract, 270, 271.

(*y*) *Price* v. *Hathaway*, 6 Madd. 304.

(*z*) *Brewster* v. *Kitchell*, 1 Salk. 198; *Esposito* v. *Bowden*, 7 E. & B. 763; *Baily* v. *De Crespigny*, L. R. 4 Q. B. 180, 186; *Metropolitan Water Board* v. *Dick, Kerr & Co.*, 1917, 2 K. B. 1, 1918, A. C. 119; cf. *Leiston Gas Co.* v. *Leiston-cum-Sizewell U. C.*, 1916, 2 K. B. 428.

(*a*) See *Krell* v. *Henry*, 1903, 2 K. B. 740; *Civil Service Co-op. Socy.* v. *General Steam Navigation Co.*, ib. 756; *Chandler* v. *Webster*, 1904, 1 K. B. 493; below, Chap. XVIII. § 1.

done in pursuance of the contract; and the parties cannot recover any money paid or property transferred under their agreement during its validity (*b*). But this doctrine of illegality supervening applies only to cases where the *performance* of the primary obligation created by the contract is rendered illegal by some event, which has occurred since the formation of the agreement; it does not extend to dissolve obligations arising from *breach* of the contract (*c*). Illustrations of this doctrine occur where the performance of a contract is rendered illegal by statute passed since its formation (*d*); and where the act agreed to be done cannot be accomplished without intercourse, whether commercial or otherwise, with the inhabitants of some foreign State, which was friendly when the contract was made, but has become hostile before the time stipulated for performance of the agreement (*e*).

(*b*) *Furtado* v. *Rodgers,* 3 B. & P. 191, 201; and see *The Teutonia,* L. R. 3 A. & E. 394, 417.

(*c*) See *Flindt* v. *Waters,* 15 East, 260, 266; note to *Clemontson* v. *Blessig,* 11 Ex. 145; *Janson* v. *Driefontein, &c.,* 1902, A. C. 484; see also *Hanger* v. *Abbott,* 6 Wallace (73 U. S.), 532, 536, 537.

(*d*) *Brewster* v. *Kitchell,* 1 Salk. 198; *Baily* v. *De Crespigny,* L. R. 4 Q. B. 180, 186.

(*e*) *Esposito* v. *Bowden,* 7 E. & B. 763; *Ertel, Bieber & Co.* v. *Rio Tinto Co.,* 1918, A. C. 260, 268; see above, p. 835; and next Chapter under the head of Aliens.

CHAPTER XVI.

OF PERSONAL INCAPACITY.

§ 1. Persons of full capacity.
§ 2. Infants.
§ 3. Lunatics and drunken persons.
§ 4. Convicts and outlaws.
§ 5. Aliens.
§ 6. Married women.
§ 7. Corporations.
§ 8. Unincorporated societies.

Full personal capacity a requisite of the contract.

To constitute a valid contract, all parties to the agreement must enjoy full contractual capacity (*a*); and when the object of the contract is the sale of land, it is also necessary, in order to carry out the parties' intention, that the vendor shall have full capacity to dispose of his land and the purchaser to accept a conveyance thereof. In the present chapter therefore we will treat of personal incapacity, not only to contract with regard to land, but also to purchase it in the legal sense of the word *purchase* (that is, to take it by any title other than descent (*b*)), to hold it and to dispose of it. A further reason for so extending our examination of personal incapacity is that, upon the investigation of the title to any land sold, it is the duty of the purchaser's advisers to consider the capacity of all persons who have made any assurance forming part of the title, to dispose of the land in the manner expressed therein (*c*).

(*a*) Above, pp. 1, 2.
(*b*) Litt. s. 12, Co. Litt. 18b.
(*c*) Above, p. 158.

§ 1.—*Persons of full capacity.*

Persons of full capacity.

As a rule, all natural persons (*d*) being of the age of twenty-one or upwards, of sound mind and in their sober senses, enjoy full capacity to purchase land, to hold it, to dispose of it and to contract with regard to it (*e*). Those who labour under some disability are infants, persons of unsound mind, drunken persons, married women, convicts, outlaws, alien enemies and corporations. We will examine the peculiar disabilities of each of these classes in turn; and in this examination we will use the word *purchase*, when printed in italics, as meaning purchase in the legal sense of the term.

§ 2.—*Infants.*

Infants.

Infants are all persons under the age of twenty-one years (*f*). The *purchase* of land by an infant is voidable at his option; that is, he may disagree thereto within a reasonable time after coming of age; and so may his heir or personal representative (according to the nature of the land) within a reasonable time after his death, if he die while the purchase is voidable. But the *purchase* remains good until set aside (*g*). Disagreement to the *purchase* is the same thing as disclaimer of the estate (*h*); so that until this take place the estate conveyed is *in* the infant or his representatives; though on the avoidance of the *purchase* it will revert (without any express assurance) to the conveying party or his successors in interest (*i*). It is now settled, as we have seen (*k*), that disclaimer of any estate in land may be made by conduct, and need not, even in the case of freeholds, be evidenced by matter of record or by deed. It follows from what has been said that an infant is under no incapacity to hold land. As regards his power to dispose of his land, the general rule is that an infant's conveyance, whether of lands or goods and

Disclaimer.

Infants' conveyances.

(*d*) Including since the Naturalization Act, 1870, aliens; stat. 33 Vict. c. 14, s. 2, now replaced by 4 & 5 Geo. V. c. 17, s. 17; see below, § 5.

(*e*) Co. Litt. 2, 42b; Wms. Real Prop. 319, 23rd ed.

(*f*) Litt. s. 259; Co. Litt. 2b, 78b, 171b.

(*g*) Co. Litt. 2b, 380b; *Ketsey's Case*, Cro. Jac. 320; 1 Prest. Abst. 327; *Birkenhead, &c. Ry. Co.* v. *Pilcher*, 5 Ex. 121, 123-128; *Thurstan* v. *Nottingham, &c. Bdg. Socy.*, 1902, 1 Ch. 1, 9, 13; affd. 1903, A. C. 6.

(*h*) See Shep. Touch. 284, 285; 2 Prest. Abst. 226, 228; *Townson* v. *Tickell*, 3 B. & A. 31.

(*i*) Above, p. 741, n. (*h*).

(*k*) Above, p. 256, n. (*r*).

whether gratuitous or for value, is voidable by himself within a reasonable time after he has attained full age (*l*), or by his representatives after his death, if he die while the conveyance is still voidable, in the same manner as his *purchase* of land (*m*). But by the effect of the Infants Relief Act,

(*l*) An infant's conveyance by act *in pais* is voidable during his minority: but an infant cannot of himself alone *conclusively* avoid during his infancy a voidable conveyance made by him; as before he attains full age his avoidance of his act *in pais* is as voidable as the act itself; see Litt. s. 258; Co. Litt. 171b, 380b; 2 Inst. 673; Bac. Abr. Infancy and Age (i. 7, iv. 374); *Slator* v. *Trimble*, 14 Ir. Com. Law, 342. But it appears that an infant may, with the sanction of the Court, effectually elect to avoid his voidable act *in pais; Stephens* v. *Dudbridge, &c. Co.*, 1904, 2 K. B. 225. Acts *in pais* include all acts affecting a person's property or legal relations other than those done in a court of record; *Beverley's Case*, 4 Rep. 123b, 124a.

Acts *in pais*.

(*m*) Litt. s. 259; Co. Litt. 45b, 171b, 308a, 380b; Shep. Touch. 232, 233; Bac. Abr. Infancy and Age (I. 3); 2 Black. Comm. 291, 292; *Zouch* v. *Parsons*, 3 Burr. 1794; *Allen* v. *Allen*, 2 Dru. & War. 307, 338, 346; Jessel, M. R., *Re D'Angibau*, 15 Ch. D. 228, 233, 234; Wms. Real Prop. 67, 13th ed.; Wms. Pers. Prop. 54, 11th ed. It is submitted that the true principle of this rule is that a man's complete consent is necessary to the validity of any conveyance or contract made by him; see above, p. 741, and n. (*h*); and that an infant cannot give such consent until he come of age; *Williams* v. *Moor*, 11 M. & W. 256, 264, 265; Benjamin on Sale, 18, 2nd ed. On this principle, a marriage settlement made by an infant, whether of real or personal estate, and whether by way of conveyance or contract, is, as a rule, voidable at his or her option; and the marriage settlement by a female infant of her property, which would at common law vest in her husband upon her marriage, is *only* supported on the ground that the settlement is in effect a settlement made by him of his own property; see *Trollope* v. *Linton*, 1 S. & S. 477, 485; *Simson* v. *Jones*, 2 Russ. & My. 365, 374; *Ellison* v. *Elwin*, 13 Sim. 309; *Le Vasseur* v. *Scratton*, 14 Sim. 116; *Field* v. *Moore*, 7 De G., M. & G. 691, 711-714; *Honywood* v. *Honywood*, 20 Beav. 451; *Duncan* v. *Dixon*, 44 Ch. D. 211; *Stevens* v. *Trevor-Garrick*, 1893, 2 Ch. 307; *Re Jones*, 1893, 2 Ch. 461; *Edwards* v. *Carter*, 1893, A. C. 360; *Re Hodson*, 1894, 2 Ch. 421; *Buckland* v. *Buckland*, 1900, 2 Ch. 534; Davidson, Prec. Conv. iii. 647 *sq.*, 3rd ed.; Wms. Pers. Prop. 553, 554, 558, 17th ed. And consider *Viditz* v. *O'Hagan*, 1900, 2 Ch. 87, where it was held that a marriage settlement made by a female infant was not binding on her, though not repudiated by her within a reasonable time after she came of age, *because* she had all the time been subject to Austrian law, which did not allow her *capacity to assent to the settlement*. In *Taylor* v. *Johnston*, 19 Ch. D. 603, 608, Bacon, V.-C., held that a voluntary gift of money by an infant was valid and not voidable, saying, "I am not aware of any law which prevents an infant from making a donation of any chattels or personal property in his actual possession"! It is submitted that this decision cannot possibly be supported, and that the suggestion made in the V.-C.'s *dictum* is entirely opposed to all the authorities above cited and cannot be accepted. The origin of the V.-C.'s mistaken decision appears to be a *dictum* of Lord Mansfield in *Buckinghamshire* v. *Drury*, 2 Eden, 60, 72, that "if an infant pays money with his own hand *without* a valuable consideration for it, he cannot get it back again." It has been conjectured that this passage is misprinted and that *with* should be read instead of *without;*

Infants' marriage settlements.

Infants' gifts of money.

Mortgages by infants.

1874 (*n*), which makes void all contracts entered into by infants for the repayment of money lent, the mortgage by an infant, either of his lands or goods, to secure the repayment of money lent to him is absolutely void; and this applies, not only to the contract of repayment, but also to the conveyance of the estate or interest mortgaged. An infant's voidable conveyance of his land, being good until set aside, passes the legal estate therein to the alienee in the first instance; but if the infant or his representatives afterwards duly elect to avoid it, the conveyance becomes absolutely void, and he or they become immediately entitled to the land, without any reconveyance, and have the right to re-enter upon and hold the same as of the infant's old estate therein. For this reason (*o*), an infant's conveyance, either of his lands or goods, is not rendered valid, like a conveyance induced by fraud (*p*), by the fact that it is made to a purchaser for value, taking in good faith and without notice of the infancy; but remains equally voidable in these circumstances at the infant's option as if it had been made gratuitously (*q*). It follows that, if one purchase land of an infant, believing him to be of full age, and then sell or mortgage it to

Effect of an infant's and its avoidance.

Infant's voidable conveyance is not made valid through purchase for value without notice of infancy.

Simpson on Infants, 75, n. (*o*), 2nd ed. And this seems highly probable, as it is certainly laid down by elder authorities that an infant's gift made by delivery of a chattel or money is voidable, and he may recover it, if he elect to avoid the gift; and may get back the money in an action of account; Perk. s. 12; *Austen* v. *Gervas*, Hob. 77; *Manby* v. *Scott*, 1 Mod. 124, 137; Bac. Abr. Infancy (I. 3), p. 367, 7th ed. Lord Mansfield's *dictum* as printed has, however, been religiously repeated; see *Holmes* v. *Blogg*, 8 Taunt. 508, 511; but it has not been followed, and it is now established that an infant may recover money paid with his own hand under a contract, from which he has derived no benefit, and which he has elected to avoid; *Corpe* v. *Overton*, 10 Bing. 252; *Hamilton* v. *Vaughan-Sherrin, &c. Co.*, 1894, 3 Ch. 589. These cases appear to dispose alike of Lord Mansfield's *dictum* and V.-C. Bacon's decision; for if an infant can recover money actually paid by him under a contract, where there was a consideration for the payment, *à fortiori* he must be able to get back money paid as a free gift.

(*n*) Stat. 37 & 38 Vict. c. 62, s. 1; *Thurstan* v. *Nottingham, &c. Bdg. Socy.*, 1902, 1 Ch. 1, 1903, A. C. 6.

(*o*) A conveyance of land induced by fraud, misrepresentation, duress or undue influence is not voidable in the same manner; the conveying party is left with a mere right of action to set the transaction aside; and if he assert this, a re-conveyance will be necessary to give him the legal estate therein; see above, pp. 748, 811.

(*p*) Above, pp. 748, 811.

(*q*) See *Johnson* v. *Pie*, 1 Keb. 905, 913, as to the mortgage there mentioned; *Stikeman* v. *Dawson*, 1 De G. & S. 90, 113; *Inman* v. *Inman*, L. R. 15 Eq. 260. Of course, where the infant's conveyance is void, as in the case of a mortgage, it cannot be so validated; *Thurstan* v. *Nottingham, &c. Bdg. Socy.*, 1902, 1 Ch. 1, 1903, A. C. 6.

another, the infant may avoid his conveyance, and recover the land from the second purchaser or the mortgagee as well as from the original buyer.

Infant's sale or purchase procured by his fraudulent representation that he is of age.

If, however, an infant *fraudulently* represent himself to be of full age, and so procure another to complete with him a transaction of sale or purchase, the transaction is in equity (though not at law (*r*)) avoidable by the party misled (*s*) in the same manner and to the same extent as if the transaction had been induced by the fraud of a person of full age (*t*). But the equitable jurisdiction, which thus prevents an infant from taking advantage of his own fraud, extends only to decreeing the rescission of the transaction and the restitution of the thing fraudulently obtained, and does not enable the party misled to obtain compensation, if he choose to affirm the transaction (*u*). And an action to recover money lent during infancy cannot be maintained on the ground of fraudulent misrepresentation as to age, since the action is in substance founded on contract and is precluded by the Infants Relief Act, 1874 (*x*), nor is the infant after coming of age under any equitable liability to repay the money (*y*). It has been held, however, that if an infant, under a fraudulent misrepresentation as to his age, purchase goods on credit, he is liable in equity, on attaining full age, to account for money received by disposing of the goods (*z*). And it seems that, on this equitable principle, if an infant, by a fraudulent representation of this kind, procure

(*r*) The rule of law is that an infant's conveyance or contract cannot be made valid by his own fraud; see *Pigot* v. *Russel*, Cro. Eliz. 124; *Johnson* v. *Pie*, 1 Keb. 905, 913; *Jennings* v. *Rundall*, 8 T. R. 335; *Nelson* v. *Stocker*, 4 De G. & J. 458, 465; *Bartlett* v. *Wells*, 1 B. & S. 836, 841; *Stocks* v. *Wilson*, 1913, 2 K. B. 235, 246, 247; *R. Leslie, Ld.* v. *Sheill*, 1914, 3 K. B. 607.

(*s*) *Watts* v. *Creswell*, 2 Eq. Ca. Abr. 515, pl. 3; *Clarke* v. *Cobley*, 2 Cox, 173; *Lemprière* v. *Lange*, 12 Ch. D. 675; *Stocks* v. *Wilson*, ubi sup.; and see *R. Leslie, Ld.* v. *Sheill*, 1914, 3 K. B. 607, 613-619, 622-624, 626-628.

(*t*) Above, pp. 809 *sq.*

(*u*) See above, n. (*s*); and cf. above, pp. 790, 794, 809 *sq.*

(*x*) Stat. 37 & 38 Vict. c. 62, ss. 1, 2.

(*y*) *R. Leslie, Ld.* v. *Sheill*, 1914, 2 K. B. 607. Before this decision it had been held that the infant incurred an equitable liability which was provable if he became bankrupt after attaining full age: *Re King, Expte. Unity, &c. Association*, 3 De G. & J. 63; *Expte. Jones*, 18 Ch. D. 109, 120-125; and though anomalous this may still be the rule in bankruptcy; see *R. Leslie, Ld.* v. *Sheill*, 1914, 3 K. B. 607, 617, 624, 625, 628.

(*z*) *Stocks* v. *Wilson*, 1913, 2 K. B. 235; as to which, see *R. Leslie, Ld.* v. *Sheill*, 1914, 3 K. B. 607, 618, 619, 622-624, 626-628.

a loan on mortgage of his lands or goods, he may be obliged under the equitable jurisdiction of the Court to repay what is owing as a condition of his invoking the assistance of the Court to declare the invalidity of the mortgage or to recover possession of the property mortgaged or the title deeds thereof (*a*). But to bring this principle into operation, there must be an actual representation made either by the infant's positive assurance that he is of age or by his active concealment of the facts (*b*); mere silence as to his age is insufficient (*c*). A power of attorney given by an infant to do on his behalf any act which might bind him is absolutely void as against him (*d*).

Infant's power of attorney.

Where an infant can make a valid conveyance.

1. Exercise of powers by an infant.

An infant is enabled to make a valid conveyance in the following cases:—First, he may convey real estate under a power simply collateral (*e*) and exercisable by deed (*f*): but he cannot convey real estate under any other power (*g*), save as mentioned below (*h*). As to personalty, an infant may also exercise by deed a power simply collateral, and may further exercise by deed any other power, as to which it appears to have been the donor's intention that it should be exercisable during infancy (*i*). But it appears that an infant cannot exercise any power over personalty so as to defeat his interest in the property which is the subject of the power (*j*). He may, however, by exercising such a power vary his interest in the property, at any rate where the variation is for his benefit (*k*). As a rule,

(*a*) See Romer, L. J., *Thurstan* v. *Nottingham, &c. Bdg. Socy.*, 1902, 1 Ch. 1, 12; *Lodge* v. *National Union Investment Co., Ld.*, 1907, 1 Ch. 300; above, p. 840, n. (*t*).

(*b*) Above, pp. 759, 799.

(*c*) *Stikeman* v. *Dawson*, 1 De G. & S. 90; *Expte. Jones*, 18 Ch. D. 109, 120-125; *Thurstan* v. *Nottingham, &c. Bdg. Socy.*, 1902, 1 Ch. 1, 12, 1903, A. C. 6; and cf. above, p. 757.

(*d*) Bac. Abr. Infancy (I. 3); *Zouch* v. *Parsons*, 3 Burr. 1794, 1804, 1808.

Power simply collateral.

(*e*) A power simply collateral is a power, by the exercise of which the donee can acquire no interest in the subject-matter of the power, given to a person, who has not any interest therein at the time of the creation of the power and takes no interest therein under the instrument conferring the power; see Sug. Pow. 47, 48, 8th ed.

(*f*) Sug. Pow. 177, 910, 8th ed.; *King* v. *Bellord*, 1 H. & M. 343, 347; *Re D'Angibau*, 15 Ch. D. 228, 232, 233.

(*g*) *Hearle* v. *Greenbank*, 3 Atk. 695; *Re D'Angibau*, 15 Ch. D. 228, 233, 241, 244, 246.

(*h*) Below, p. 851 and nn. (*m*), (*n*), (*o*).

(*i*) *Re Cardross's Settlement*, 7 Ch. D. 728; *Re D'Angibau*, 15 Ch. D. 228; *Pouey* v. *Hordern*, 1900, 1 Ch. 492, 495; *Re Wernher*, 1918, 2 Ch. 82, 91; *Re Sutton*, 1921, 1 Ch. 257, 265.

(*j*) *Re Armit*, 5 I. R. Eq. 352, 365; Farwell on Powers, 142, 3rd ed.

(*k*) *Re Sutton*, ubi sup.

an infant cannot now exercise any power by will; for by the Wills Act no will made by an infant is valid (*l*). But under the Wills (Soldiers and Sailors) Act, 1918 (*m*), soldiers on an expedition and mariners or seamen at sea, and the other persons thereby authorised to make informal wills of their real and personal estate (*n*), may, notwithstanding that they are infants, exercise by will any general power of appointment by will, which has been given to them, whether over real or personal estate (*o*).

Power exercisable by will.

Secondly, under the custom of gavelkind an infant of the age of fifteen years or upwards may make a valid conveyance of his land, whereof he is seised subject to this custom, by feoffment executed on sale for valuable consideration (*p*). In this case the feoffment need not be evidenced by deed (*q*): but it must be put into writing and signed by the infant in order to satisfy the Statute of Frauds (*r*); and livery of seisin must be made by the infant in person (*p*). The custom, however, does not extend to enable the infant to give a valid receipt for the consideration money; the practice is therefore to endorse on the conveyance a written attestation of the fact of payment, instead of inserting the usual receipt (*s*). But it is thought that the money may be safely paid to the infant (*s*). Where it appeared on the face of a feoffment on sale by a dowress and co-heirs in gavelkind, of whom one was an infant, that the infant had

2. Feoffment by an infant under the custom of gavelkind.

(*l*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 7; Sug. Pow. 178, 8th ed.

(*m*) Stat. 7 & 8 Geo. V. c. 58, ss. 1, 3, passed 6th February, 1918.

(*n*) Soldiers here include members of the Royal Air Force; and members of H.M.'s naval or marine forces enjoy this privilege, not only at sea, but also when so circumstanced that if they were soldiers they would be on actual military service; see stat. 7 & 8 Geo. V. c. 58, ss. 2, 5 (2); Wms. Real Prop. 261-263, 23rd ed.

(*o*) *Re Wernher*, 1918, 1 Ch. 339, 2 Ch. 82. The reasoning in this case extends to justify the exercise by such infants by will of general powers over real estate; informal wills of real estate by such infants being for the first time authorised by the above Act; see s. 3; *Godman* v. *Godman*, 1920, P. 261; Wms. Real Prop. 261-263, 23rd ed.

(*p*) Davidson, Prec. Conv. vol. ii. pt. i. 244, n., 4th ed.; *Re Maskell and Goldfinch's Contract*, 1895, 2 Ch. 525, 528, 529.

(*q*) Stat. 8 & 9 Vict. c. 106, s. 3.

(*r*) Stat. 29 Car. II. c. 3, s. 1.

(*s*) See authorities cited in note (*p*), above; where it is also stated that it is often advisable for the infant's sake that the purchaser should require the money to be invested in the names of trustees or in the infant's name until the infant attains twenty-one. It is conceived that if this course be adopted, it must be purely accessory to the payment of the money to the infant himself; for he cannot make a valid appointment of trustees for himself, so as to enable them to give a good discharge for the purchase money.

not received full value for his share, it was held that the title was too doubtful to be forced by the purchaser on a subsequent purchaser from him (*t*). It is conceived, however, that where it is not apparent that the sale was at an undervalue, it will be presumed that the infant received full value for his land (*u*).

3. Under the Infant Settlements Act.

Thirdly, by the Infant Settlements Act, 1855 (*x*), every infant not under twenty if a male, and not under seventeen if a female, is empowered to make upon or in contemplation of his or her marriage (*y*), and with the sanction, formerly of the Court of Chancery and now of the Chancery Division of the High Court (*z*), a valid and binding settlement of all or any part of any property, whether real or personal, and whether in possession, reversion, remainder or expectancy (*a*), to which he or she is entitled, or over which he or she has any power of appointment, except a power expressly declared not to be exercisable by an infant. The Act makes every conveyance or contract to convey (*a*), executed by an infant with the approbation of the Court for giving effect to such settlement, as valid and effectual as if the infant were of full age (*b*): but provides (*c*) that any appointment under a power or disentailing assurance

(*t*) *Re Maskell and Goldfinch's Contract,* 1895, 2 Ch. 525. It appeared that the mother had received more than the just value of her interest as dowress, hence the infant's conveyance was voidable on the ground of undue influence; above, p. 822.

(*u*) See above, pp. 108, 274.

(*x*) Stat. 18 & 19 Vict. c. 43, extended to the Court of Chancery in Ireland by stat. 23 & 24 Vict. c. 83.

(*y*) It has been held that, in the case of an infant ward of Court who has married without the Court's consent, a post-nuptial settlement of her property may be made under this Act; *Powell* v. *Oakley,* 34 Beav. 575; *Re Sampson and Wall,* 25 Ch. D. 482. There are conflicting judicial decisions and opinions as to whether the Act authorises a post-nuptial settlement in other cases; see *Re Potter,* L. R. 7 Eq. 484; *Re Sampson and Wall,* ubi sup.; *Re Phillips,* 34 Ch. D. 467; *Buckmaster* v. *Buckmaster,* 34 Ch. D. 21, 26, 33, 40, affirmed, nom. *Seaton* v. *Seaton,* 13 App. Cas. 61, 68, 75, 76. In this last case it was decided that the Act removed the disability of infancy only, and did not enable a female ward of Court by a post-nuptial settlement made thereunder to dispose of her reversionary chose in action, which she could not otherwise alien.

(*z*) As to infants' marriage settlements made without such sanction, see above, p. 847, n. (*m*).

(*a*) The Act thus enables an infant to make a perfectly valid covenant in the settlement to settle his or her after-acquired property; *Re Johnson,* 1891, 3 Ch. 48.

(*b*) Stat. 18 & 19 Vict. c. 43, s. 1.

(*c*) Sect. 2.

executed by any infant *tenant in tail* under the Act shall become absolutely void if the infant die under age. It has been held that this provision invalidates appointments made by tenants in tail only, and not those made by other persons (*d*).

4. By statute in certain special cases.

Fourthly, infants are in certain special cases enabled by statute to make valid conveyances of land; *e.g.*, with the sanction of the Court for the purpose of giving effect to the sale or mortgage of a deceased testator's or intestate's lands in order to satisfy his debts (*e*), or to the surrender or grant of renewable leases (*f*). And infants' lands may by statute be assured by or with the consent of their guardians for certain charitable or meritorious uses (*g*) or public purposes (*h*).

Leases, sales and improvements of infants' land.

By the effect of the Conveyancing Act, 1881 (*i*), the Court is enabled to authorise the same leases, sales, and improvements of any land, of or to which an infant is in his own right seised or entitled for an estate in fee simple or for any leasehold interest at a rent, as the Court has power to authorise in the case of a settled estate by virtue of the Settled Estates Act, 1877 (*k*).

Sale or lease of infant's land under the Settled Land Acts.

And by the effect of the Settled Land Act, 1882 (*l*), all the powers of a tenant for life under that Act may be exercised on behalf of an infant, not only where he is or has the powers of a tenant for life under the Act, but also with regard to any land, of or to which he is in his own right seised or entitled

(*d*) *Re Scott*, 1891, 1 Ch. 298.

(*e*) Stats. 11 Geo. IV. & 1 Will. IV. c. 47, s. 11; 2 & 3 Vict. c. 60; 11 & 12 Vict. c. 87. These provisions are now superseded in practice by those of the Trustee Act, 1893, ss. 26, 27, 30, amended by s. 1 of the Trustee Act, 1894; see Seton on Judgments, 940, 7th ed.

(*f*) Stat. 11 Geo. IV. & 1 Will. IV. c. 65, ss. 12, 16, 31.

(*g*) As for sites for schools, stat. 4 & 5 Vict. c. 38, s. 5; for literary, scientific, and like institutions, stat. 17 & 18 Vict. c. 112, s. 5; for places of worship or burial, stat. 36 & 37 Vict. c. 50, s. 3; see above, p. 432, n. (*f*). As to infants' land required for the erection or construction of any house or building for the purposes of any charity, see stats. 16 & 17 Vict. c. 137, s. 7, amended by 18 & 19 Vict. c. 124, s. 41.

(*h*) As under the Lands Clauses Act, 1845, stat. 8 & 9 Vict. c. 18, ss. 7, 69, 75, 81; or for the defence of the realm, stat. 23 & 24 Vict. c. 112, s. 11.

(*i*) Stat. 44 & 45 Vict. c. 41, s. 41. As to the powers of dealing with infants' land before this enactment, see Wms. Conv. Stat. 200-203.

(*k*) Stat. 40 & 41 Vict. c. 18.

(*l*) Stat. 45 & 46 Vict. c. 38, ss. 59, 60, not applying to infant married women; see sect. 61 (1).

in possession for any estate or interest (*m*); and in such case these powers are exercisable by the trustees of the settlement (*n*), if any, or if there be none, then by such person and in such manner as the Court, on the application of the infant's testamentary or other guardian or next friend, may order. Under these enactments, any land, of which an infant is tenant for life at law or in equity, or in which he has any other estate or interest giving him the powers of a tenant for life under the Settled Land Act, 1882 (*o*), or of which he is seised in fee, or to which he is otherwise entitled in possession, may be effectively sold and conveyed to a purchaser, notwithstanding his infancy; and any leases authorised by the Settled Land Act may be made thereof in like manner. Where persons are specially appointed by the Court to exercise the powers so conferred, there being no trustees of the settlement, it is not necessary that such trustees should also be appointed in order that notice may be given to them of the intention to exercise the powers, and the persons so appointed may well exercise the powers, notwithstanding that there are no such trustees (*p*): but in that case any purchase or other capital money must be paid into Court, the persons so appointed having no authority to give a good receipt therefor (*q*). If, however, there be trustees of the settlement and the powers in question be exercised by them, it will lie in their option, as exercising the powers of a tenant for life, to direct the purchase or other capital money to be paid either to themselves, as trustees of the settlement, or into Court (*r*), and if they choose to direct payment to be made to themselves, their receipt will be a good discharge to the purchaser (*s*). And this is the case, not only where the infant has a life or other limited estate giving him the powers of a tenant for life of settled land, but also where he is seised in fee or otherwise absolutely entitled in possession, and trustees of the settlement deemed under sect. 59 of the Settled Land Act, 1882, to be existing are appointed by the Court (*t*).

(*m*) See *Re Wells*, 31 W. R. 764, W. N. 1883, p. 111; *Re Morgan*, 24 Ch. D. 114; *Re Newcastle's Estate*, ib. 129, 139, 140; *Re Sparrow's Settled Estate*, 1892, 1 Ch. 412; *Re Simpson*, 1897, 1 Ch. 256.

(*n*) Above, p. 286.

(*o*) Stat. 45 & 46 Vict. c. 38, s. 58.

(*p*) See above, pp. 283 *sq.*

(*q*) *Re Dudley's Contract*, 35 Ch. D. 338; see above, p. 282.

(*r*) Stat. 45 & 46 Vict. c. 38, ss. 22 (1), 60; above, p. 282.

(*s*) See *Re Newcastle's Estates*, 24 Ch. D. 129, 137-140, 142; 1 Key & Elph. Prec. Conv. 521, n. (*b*), 4th ed.; 594, 599, n. (*d*), 10th ed.; 607, 612, n. (*d*), 11th ed.

(*t*) See *Re Dudley's Contract*, 35 Ch. D. 338, 342, 344; *Re Simpson*, 1897, 1 Ch. 256, 259.

Infants' contracts.

At common law, the contracts of infants are generally voidable at their option (*u*), but are valid if beneficial to the infant in the opinion of the Court (*x*), especially contracts for necessaries, or whatsoever things are reasonably necessary for the use of the infant according to his circumstances and condition of life (*y*). But by the 1st section of the Infants Relief Act, 1874 (*z*), all contracts thenceforth entered into by infants for the repayment of money lent or to be lent (*a*), or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants shall be absolutely void: provided always that this enactment shall not invalidate any contract into which an infant may by any existing or future

Infants Relief Act, 1874.

(*u*) *Warwick* v. *Bruce,* 2 M. & S. 205, 6 Taunt. 118; *Williams* v. *Moor,* 11 M. & W. 256; *Carter* v. *Silber,* 1892, 2 Ch. D. 278; affirmed nom. *Edwards* v. *Carter,* 1893, A. C. 360; *Stephens* v. *Dudbridge, &c. Co.,* 1904, 2 K. B. 225; *Nash* v. *Inman,* 1908, 2 K. B. 1, 11, 12. There is authority to the effect that a unilateral contract by an infant entirely to his own detriment is absolutely void: but it is doubtful whether this means anything more than that it is void as against him, *i.e.,* that he cannot be obliged to perform it, though he may do so, if he likes; see *Whelpdale's case,* 5 Rep. 119; *Saunderson* v. *Marr,* 1 H. Bl. 75; *Baylis* v. *Dinely,* 3 M. & S. 477; *Kingsman* v. *Kingsman,* 6 Q. B. D. 122, 127.

(*x*) *Clements* v. *London and North Western Ry. Co.,* 1894, 2 Q. B. 482; *Bromley* v. *Smith,* 1909, 2 K. B. 235; see *Cowern* v. *Nield,* 1912, 2 K. B. 419. An infant cannot repudiate a contract, so as to give to the other party the right to terminate it, unless the repudiation is for his benefit; *Waterman* v. *Fryer,* 1922, 1 K. B. 499, 505.

Infant's repudiation of contract.

(*y*) *Ryder* v. *Wombwell,* L. R. 4 Ex. 32; *Johnstone* v. *Marks,* 19 Q. B. D. 509; *Walter* v. *Everard,* 1891, 2 Q. B. 369; *Nash* v. *Inman,* 1908, 2 K. B. 1; *Roberts* v. *Gray,* 1913, 1 K. B. 520. It may be noted that the law does not go beyond allowing infants' contracts to pay for necessaries supplied to be good. An infant's conveyance, charge, bill, or note, which would otherwise be voidable or void, is not made valid by the fact that it was made or given in consideration of the supply of necessaries; *Martin* v. *Gale,* 4 Ch. D. 428; *Re Soltykoff,* 1891, 1 Q. B. 413. Persons who have furnished an infant with money to buy necessaries are, however, entitled in equity to stand, by subrogation, in the place of those who supplied the necessaries; *Marlow* v. *Pitfeild,* 1 P. W. 558.

(*z*) Stat. 37 & 38 Vict. c. 62.

(*a*) By the Betting and Loans (Infants) Act, 1892, stat. 55 Vict. c. 4, s. 5, if any infant, who has contracted a loan which is void in law, agrees after he comes of age to pay any money which in whole or in part represents or is agreed to be paid in respect of any such loan, and is not a new advance, such agreement, and any instrument, negotiable or other, given in pursuance of or for carrying into effect such agreement, or otherwise in relation to the payment of money representing or in respect of such loan, shall, so far as it relates to money which represents or is payable in respect of such loan, and is not a new advance, be void absolutely as against all persons whomsoever; and for the purposes of this section any interest, commission, or other payment in respect of such loan shall be deemed to be a part of such loan.

statute or by the rules of common law or equity enter, except such as now by law are voidable. And by the 2nd section, no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age. The first section of this Act makes void the particular contracts therein specified only (*b*). The second section, prohibiting any action upon the *ratification* of an infant's contract (*c*), is held to apply to *all* contracts, of which before the Act the burthen of proving a ratification after full age (*d*) lay upon the party, who sought to enforce them (*e*). These are all contracts, as to which under the old practice a plea of infancy merely was a sufficient plea in bar of an action to enforce them, and the plaintiff could not recover unless he set up and maintained a plea of ratification after attaining full age by way of replication (*f*). Such were contracts executory on both sides, whether to be performed during infancy or afterwards, and contracts to be performed by the infant, either within age or afterwards, in consideration of some fleeting benefit executed in his favour, as the supply of money or of goods other than necessaries (*f*). There are, however, some contracts by infants which remain binding on them after they have attained full age, unless within a reasonable time after coming of age

(*b*) *Duncan* v. *Dixon,* 44 Ch. D. 211.

(*c*) This enactment does not prevent the parties to a contract made in the infancy of one of them from making a new contract to the same effect after the infant is come of age; see *Northcote* v. *Doughty,* 4 C. P. D. 385; *Ditcham* v. *Worrall,* 5 C. P. D. 410.

(*d*) By Lord Tenterden's Act, stat. 9 Geo. IV. c. 14, s. 5, no action should be maintained to charge any person upon any promise made after full age to pay any debt contracted during infancy or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification were made by some writing signed by the party to be charged therewith. This enactment was superseded by s. 2 of the Infants Relief Act, 1874, and repealed by stat. 38 & 39 Vict. c. 66.

(*e*) *Expte. Kibble,* L. R. 10 Ch. 373; *Coxhead* v. *Mullis,* 3 C. P. D. 439.

(*f*) The burthen of proving infancy lay upon the party who pleaded it, but if this were established, the *onus* of proving ratification was upon the party who set up that plea; see *Borthwick* v. *Carruthers,* 1 T. R. 648; *Cohen* v. *Armstrong,* 1 M. & S. 724; *Hunt* v. *Massey,* 5 B. & Ad. 902; *Hartley* v. *Wharton,* 11 A. & E. 934; *Williams* v. *Moor,* 11 M. & W. 258; *Harris* v. *Wall,* 1 Ex. 122; *North Western Ry. Co.* v. *McMichael,* 5 Ex. 114, 125, 126; Chitty on Pleading, i. 607, iii. 33, 170, 177, 426, 7th ed.

they repudiate them and give notice of such repudiation to the other party; and the party who sues an infant on one of these contracts has, *primâ facie*, a good cause of action and was not obliged to prove ratification as a condition precedent to charging the infant thereon (*g*). Of this kind are contracts, by which a permanent interest in property is immediately conferred on the infant, and he himself is laid in return under a continuing obligation (*h*) to be performed partly or wholly after he has attained full age. Instances of this class of contract are the acceptance by an infant of some permanent property, to which a liability is incident, as where he takes a lease of land at a rent (*i*) or shares not fully paid up in a company (*k*). And the same principle has been applied where an infant has by his marriage settlement taken a permanent interest in property and entered into a covenant, which may operate as a disposition of property in equity; as to settle some property to be afterwards acquired by him (*l*). In these cases, if the infant wish to escape liability on the contract, he must repudiate it and renounce all benefit thereunder and duly communicate (*m*) his repudiation to the other party within a reasonable time after coming of age (*n*). For these contracts remain good until set aside; and if the infant omit so to avoid them, they will be perfectly binding on him, and the Infants Relief Act will be no bar to an action to enforce them (*o*).

The other party to an infant's contract is bound.

As a rule, when an infant makes a contract which is voidable at his option, the other party is firmly bound, and the infant can enforce the contract either during infancy or after-

(*g*) See *Goode* v. *Harrison*, 5 B. & A. 147.

(*h*) See *Goode* v. *Harrison*, 5 B. & A. 147.

(*i*) *Ketsey's case*, Cro. Jac. 320; and see *Holmes* v. *Blogg*, 8 Taunt. 35.

(*k*) *Cork and Bandon Ry. Co.* v. *Cazenove*, 10 Q. B. 935; *North Western Ry. Co.* v. *McMichael*, 5 Ex. 114; *Lumsden's case*, L. R. 4 Ch. 31; *Ebbetts' case*, L. R. 5 Ch. 302.

(*l*) *Duncan* v. *Dixon*, 44 Ch. D. 211, 214; *Carter* v. *Silber*, 1892, 2 Ch. 278; affirmed, nom. *Edwards* v. *Carter*, 1893, A. C. 360; *Carwell* v. *Harrison*, 1916, 1 Ch. 328; and see *Re Reis*, 1904, 2 K. B. 769, as to the nature of contracts of this kind.

(*m*) See above, p. 810.

(*n*) The reasonable time is to be calculated from the infant's coming of age, and not, in the case of reversionary property, from its falling into possession; *Carwell* v. *Harrison*, above.

(*o*) *Carter* v. *Silber*, 1892, 2 Ch. 278, 284; affirmed, 1893, A. C. 360; *Carwell* v. *Harrison*, 1916, 1 Ch. 328; and see *Viditz* v. *O'Hagan*, 1900, 2 Ch. 87, 96-100.

Infant cannot enforce specific performance.

wards (*p*). But an infant cannot enforce during infancy the specific performance of any contract made by him, on account of the want of mutuality of remedy between the other party and himself (*q*). It appears, however, that formerly an infant might successfully sue on attaining full age for specific performance of a contract made in infancy and originally voidable by him; for to maintain such an action he must have submitted to perform his part of the contract, and that would have been an affirmance of his liability thereunder and would have rendered the remedy mutual (*r*). But it seems that, since the Infants Relief Act, 1874 (*s*), an infant can no longer enforce the specific performance of such a contract after attaining full age, unless the contract be one of the continuing kind, which remain binding on him unless he avoid them (*t*). For in all other cases he cannot now bind himself by ratification of the contract; and so there can be no mutuality of remedy.

Completed sale of land by infant.

To apply these principles to sales of land:—A completed sale of land by an infant is, as a rule, voidable at his option (*u*); he may recover the land, and it appears that, in the absence of fraud, he cannot be obliged to repay the purchase money (*x*).

(*p*) *Warwick* v. *Bruce*, 2 M. & S. 205, 6 Taunt. 205.

(*q*) *Flight* v. *Bolland*, 4 Russ. 298; *Lumley* v. *Ravenscroft*, 1895, 1 Q. B. 683; see below, Chap. XIX. § 3.

(*r*) See *Clayton* v. *Ashdown*, 9 Vin. Abr. 393; 2 Dart, V. & P. 1044, 5th ed.; 1161, 6th ed.; Fry, Sp. Perf. § 460, n. The same principle seems applicable as that on which contracts for the sale of land signed *only* by one party were held to be specifically enforceable against him, notwithstanding the original want of mutuality; *Child* v. *Comber*, 3 Swanst. 423, n.; *Seton* v. *Slade*, 7 Ves. 265, 275; *Fowle* v. *Freeman*, 9 Ves. 351; *Western* v. *Russell*, 3 V. & B. 187, 192; *Flight* v. *Bolland*, 4 Russ. 298, 301; Fry, Sp. Perf. § 471; see below, Chap. XIX. § 3.

(*s*) Above, p. 855.

(*t*) Above, pp. 856, 857.

(*u*) Above, pp. 846 *sq.*

(*x*) See *Johnston* v. *Pie*, 1 Keb. 905, 913, where it appears that the infant had avoided a mortgage made by him; *Stikeman* v. *Dawson*, 1 De G. & S. 113; *Thurstan* v. *Nottingham, &c. Bdg. Socy.*, 1902, 1 Ch. 1, 12, 13; affirmed, 1903, A. C. 6; above, p. 848. It is true that in the last-mentioned case the mortgage was made void *ab initio* by statute. But that does not appear to make any difference. Where an infant's conveyance is voidable at his option, it becomes absolutely void when he chooses to repudiate it; above, p. 848. And where the law declares that a man's conveyance is void as against him, equity will not, in the absence of fraud, impose terms of restitution or payment as a condition of his exercising his legal right to recover possession of the property; see *Chapman* v. *Michaelson*, 1909, 1 Ch. 238. Otherwise the protection which the law accords to infants would be effectually defeated. And since the law regards the protection of infants

But if he fraudulently represented himself to be of full age, he would in equity be restrained from recovering the land without refunding the price (*y*). A completed purchase of land by an infant is voidable at his option in the sense that he may disclaim the estate (*z*), and so escape any liability incident thereto; as the liability for the rent and covenants, if the land bought were leasehold (*a*). But it is doubtful whether he can in any case recover the price paid. He certainly cannot do so unless he be in a position to make entire restitution; for it is established that, if this condition cannot be complied with, an infant cannot recover money paid for the purchase of things which are not necessaries (*b*). Thus if he purchase leasehold land, which is a wasting property, he cannot recover the price paid for it (*c*). It is not certain, however, that if an infant buy land held in fee, he cannot avoid the purchase and also recover the price. For the reason why an infant has been held to be debarred from recovering money paid by him on a purchase, seems to be that he could not put the other party in the same position as before (*d*); and we have seen that in the case of a purchase of land induced by fraud, mere occupation of the land sold is not considered to be a bar to *restitutio in integrum*, so long as the land has not been so wasted that the depreciation in value could not properly be met by paying compensation in money (*e*). There seems therefore to be ground for contending that an infant may in like case recover his purchase money (*f*). It appears too that, if there were a total failure of consideration

Completed purchase of land by infant.

against their natural want of discretion as of such paramount importance that it will not lay an infant under an obligation *ex delicto* to repay money obtained under a contract induced by the infant's fraud (see *Johnson* v. *Pie*, ubi sup.; *Jennings* v. *Rundall*, 8 T. R. 335, 337; *R. Leslie, Ld.* v. *Sheill*, 1914, 3 K. B. 607, 612), it does not appear that, where money is paid to an infant under a contract in the belief, *not* induced by his fraud, that he is of full age, the law imposes on him any obligation *quasi ex contractu* to repay the money as having been parted with under a mistake of fact; see *Cowern* v. *Nield*, 1912, 2 K. B. 419. Cf. the law applied in the case of contracts made with married women and induced by their fraud; see below, § 6.

(*y*) Above, pp. 849, 850.

(*z*) Above, p. 846.

(*a*) *Holmes* v. *Blogg*, 8 Taunt. 508, 509.

(*b*) *Holmes* v. *Blogg*, 8 Taunt. 508; *Valentini* v. *Canali*, 24 Q. B. D. 166.

(*c*) *Holmes* v. *Blogg*, 8 Taunt. 508.

(*d*) See cases cited n. (*b*), above; *Hamilton* v. *Vaughan-Sherrin, &c. Co.*, 1894, 3 Ch. 589, 592-594.

(*e*) Above, pp. 811, 816, 817.

(*f*) See 1 Dart, V. & P. 27, 5th ed.; 31, 6th ed.; 33, 7th ed.

on the purchase of land by an infant—as if the vendor had no title, and the infant were instantly ejected—the infant might recover the price paid (*g*). If an infant buy land without paying the whole or part of the purchase money, he holds the land subject to the vendor's lien thereon for the amount unpaid (*h*); and if land bought by an infant be paid for with money advanced to him by another person for the purpose, the lender is entitled by subrogation to the same lien as the vendor would have had, if he had remained unpaid (*i*). If an infant contract to sell or buy land, the contract appears to be voidable at his option (*k*). The other party is completely bound at law, but the infant cannot enforce the specific performance of the contract, either during infancy, or (it seems) after attaining twenty-one (*l*). And the other party cannot effectually sue the infant on any ratification of the contract made by him after coming of age (*m*). It does not appear that an infant's contract to pay after attaining full age, either wholly or partly and either at one time or by instalments, for land bought by and conveyed to him in infancy would be such a contract as would be binding on him after coming of age unless he repudiated it within a reasonable time thereafter (*n*). Thus if in such case the vendor waived his lien and accepted the infant's personal liability or his promissory note or notes for such payment, it is thought that, apart from the Infants Relief Act, the *onus* of proving a ratification of the contract would fall on the vendor, and so that Act would deprive him of any remedy for the recovery of the money (*o*). It has been held that, if an infant contract to buy land and pay a deposit, and afterwards refuse to complete the purchase, he cannot recover the deposit, unless he can show that the contract was induced by the vendor's fraud (*p*). But it is submitted that this decision is open to be

Infant's contract to buy or sell land.

Recovery of deposit by infant avoiding his contract to buy land.

(*g*) *Hamilton* v. *Vaughan-Sherrin, &c. Co.*, 1894, 3 Ch. 589; see above, p. 847, n. (*m*).

(*h*) Above, p. 482, n. (*n*).

(*i*) *Thurstan* v. *Nottingham, &c. Bdg. Socy.*, 1902, 1 Ch. 1, 1903, A. C. 6.

(*k*) Above, p. 855. It is conceivable that the purchase of land by an infant may be a contract for necessaries, as if he required a residence and could obtain one in no other way; but this would be an exceptional case.

(*l*) Above, pp. 857, 858.

(*m*) Above, p. 856.

(*n*) See above, p. 857.

(*o*) Above, pp. 855, 856, and n. (*f*).

(*p*) *Wilson* v. *Kearse*, Peake, Add. Cas. 196. See also *Expte.*

reviewed in the light of the principle established as above mentioned, that where an infant pays money for the purchase of other things than necessaries, he cannot recover it *if he be not in a position to make entire restitution to the seller* (*q*); and that, according to later cases, if an infant pay away money without getting the *possession* or substantial enjoyment of anything in return, the payment is voidable and the money recoverable (*r*).

§ 3.—*Lunatics and drunken persons.*

Persons of unsound mind.

According to modern law, the act *in pais* (*s*) of a person who is so insane as to be incapable of understanding its effect, is void, if it be purely gratuitous (*t*): it is voidable, if it be done for valuable consideration under agreement with some person who was aware of his insanity (*u*); and it is valid, if it be done for valuable consideration under agreement with some person dealing with him in good faith and without knowledge of or reasonable cause to suspect his insanity (*x*). This doctrine applies to all dispositions of property as well as to all contracts

Taylor, 8 De G., M. & G. 254, where note that payments had been made to the infant under the contract; and cf. *Corpe* v. *Overton,* 10 Bing. 252.

(*q*) Above, p. 859.

(*r*) Above, pp. 847, n. (*m*), 859, 860.

(*s*) See above, p. 847, n. (*l*).

(*t*) *Elliot* v. *Ince,* 7 De G., M. & G. 475; *Manning* v. *Gill,* L. R. 13 Eq. 485; see also *Clerk* v. *Clerk,* 2 Vern. 412; *Expte. Roberts,* 3 Atk. 308, 312, 313. But it seems that the delivery by such a person of any chattel, wherein the property passes by delivery, must be voidable only, as was an insane person's feoffment with livery of seisin before the year 1845; *Thompson* v. *Leech,* 3 Salk. 300, 301; Bac. Abr. Idiots and Lunatics (P); Sug. Pow. 604, 605, 8th ed.; cf. above, p. 847, n. (*m*). As to a power of attorney given by an insane person, see *A.-G.* v. *Parnther,* 3 Bro. C. C. 441, 4 Bro. C. C. 409; *Daily Telegraph Newspaper Co.* v. *McLaughlin,* 1904, A. C. 776; and as to the degree of mental capacity necessary to make a valid will, see *Banks* v. *Goodfellow,* L. R. 5 Q. B. 549; *Smee* v. *Smee,* 5 P. D. 84. A lunatic so found by inquisition cannot, so long as the inquisition continues in force, validly dispose of his property by deed during a lucid interval; *Re Walker,* 1905, 1 Ch. 160. This doctrine has also been applied to dispositions of property by a person, of whose estate a receiver has been appointed under sect. 116 (1, d) of the Lunacy Act, 1890 (stat. 53 Vict. c. 5; above, p. 531, n. (*q*)), on the ground that such person is through mental infirmity arising from disease or age incapable of managing his affairs; *Re Marshall,* 1920, 1 Ch. 284.

(*u*) See *Matthews* v. *Baxter,* L. R. 8 Ex. 132; Pollock on Contract, 99, 100, 9th ed.

(*x*) *Molton* v. *Camroux,* 2 Ex. 487, 4 Ex. 17; *Imperial Loan Co.* v. *Stone,* 1892, 1 Q. B. 599.

made by an insane person, and so governs his *purchase* and conveyance of land equally with his contract to sell or buy it (*y*). And it has not only been held that the *promise* of an insane person made for valuable consideration *paid or executed* in good faith without notice of his insanity is at law enforceable against him, but it has also been laid down that the same doctrine is applicable whether the *contract* be executed or executory (*z*). As yet, however, it has not been precisely decided whether or how far a contract made in good faith with an insane person without notice of his insanity is enforceable against him, where the consideration is executory on both sides and consists of mutual promises. But it seems to be no objection that the consideration given in the insane man's favour is executory only; for if he make a conveyance of his property in consideration of some promise made to him by a person acting in good faith and without notice of his insanity, the conveyance is held to be valid and irrevocable (*a*). It appears, therefore, that an insane man's contract is valid at law, if the other party enter into it in good faith and in ignorance of his insanity, notwithstanding that it consist of mutual promises only. It follows from what has been said above that an insane person is under no incapacity to hold land.

Who may avoid an insane man's voidable act.

Where the *purchase*, conveyance or contract of a person of unsound mind is voidable, it may be affirmed or avoided by himself if he recover his senses (*b*), or by his representatives after his death if he die insane, or die sane but without having affirmed the transaction (*c*). An insane man's voidable contract may also be avoided during his insanity; for if he be sued thereon, as he may be (*d*), his committee or guardian *ad litem* may defend the action on his behalf (*e*), and may plead his insanity, coupled with the plaintiff's knowledge thereof, at the

(*y*) See *Price* v. *Berrington*, 3 Mac. & G. 486; *Elliot* v. *Ince*, 7 De G., M. & G. 475, 487, 488; Sug. Pow. 604, 605, 8th ed.

(*z*) *Imperial Loan Co.* v. *Stone*, 1892, 1 Q. B. 599.

(*a*) *Molton* v. *Camroux*, 2 Ex. 487, 4 Ex. 17; *Beavan* v. *McDonnell*, 9 Ex. 309.

(*b*) *Molton* v. *Camroux*, ubi sup.; Sug. Pow. 605, 8th ed.

(*c*) Co. Litt. 2b; 2 Black. Comm. 291; *Bennet* v. *Vade*, 2 Atk. 324; *Frank* v. *Mainwaring*, 2 Beav. 115.

(*d*) Insane persons are not exempt from being sued; see *Owen* v. *Davies*, 1 Ves. sen. 82; *Brockwell* v. *Bullock*, 22 Q. B. D. 567; and as to execution against their property, *Re Clarke*, 1898, 1 Ch. 336; *Re Brown*, 1900, 1 Ch. 489; *Re Seager Hunt*, 1900, 2 Ch. 54, n.

(*e*) R. S. C. 1883, Order XVI. rule 17.

time of making the contract; and this plea, if proved, will bar the action (*f*). And as an insane person may sue, if found lunatic by inquisition, by his committee, and otherwise by his next friend (*g*), to obtain any remedy which he might assert, if sane, in person (*h*), active proceedings may be so taken on his behalf during his insanity to set aside any voidable *purchase*, conveyance or contract taken or made by him (*i*). In the case of lunatics so found by inquisition the Court in Lunacy has jurisdiction to elect on their behalf to avoid or confirm any voidable *purchase*, conveyance or contract made by them, and will exercise this jurisdiction as may be best for the lunatic's benefit (*k*). And the High Court has the like jurisdiction to elect on behalf of insane persons not so found (*l*).

Insane man's contract to buy or sell land.

Whether specific performance by the lunatic will be ordered.

It thus appears that, if an insane person contract to sell or buy land, the contract will be voidable or valid, according as the other party had or had not knowledge of the insanity (*m*). It has not been decided, since this doctrine was established, whether the Court will make an order for the specific performance by an insane person of a valid contract made by him during his insanity. Under the old law, which regarded all lunatics' contracts as void (*n*), the Court of Chancery would not decree the specific performance by a lunatic of a contract made whilst he was of unsound mind (*o*); and apparently it would order the

(*f*) See *Imperial Loan Co.* v. *Stone*, 1892, 1 Q. B. 599.

(*g*) R. S. C. 1883, Order XVI. rule 17. The committee should obtain the sanction of the Master in Lunacy before suing; see *Re Hinchcliffe*, 73 L. T. 522; but the next friend need not do so; see next note. The committee so suing must be made a co-plaintiff; *Re Lord Townshend's Settlement*, 1908, 1 Ch. 201.

(*h*) *Didisheim* v. *London and Westminster Bank*, 1900, 2 Ch. 15, 43; *New York, &c. Co.* v. *Keyser*, 1901, 1 Ch. 666; see also Pope on Lunacy, 329, 2nd ed.; *Coppendale* v. *Sunderland*, Barnes, 42; *Jones* v. *Lloyd*, L. R. 18 Eq. 265; *Wilder* v. *Pigott*, 22 Ch. D. 263, 268: *Porter* v. *Porter*, 37 Ch. D. 420.

(*i*) *Fisher* v. *Melles*, L. R. 18 Eq. 268, n.; *Re Gordon*, L. R. 10 Ch. 192.

(*k*) Bac. Abr. Idiots (D, F); *Sergeson* v. *Sealey*, 2 Atk. 412; *Re Sefton*, 1898, 2 Ch. 378; *Baldwyn* v. *Smith*, 1900, 1 Ch. 588.

(*l*) *Wilder* v. *Pigott*, 22 Ch. D. 263, 268.

(*m*) Above, pp. 861, 862; see *Sergeson* v. *Sealey*, 2 Atk. 412; *Baldwyn* v. *Smith*, 1900, 1 Ch. 588, where it does not appear whether the other party was aware of the insanity or not. The learned judge's *dictum* that the contract was voidable must be confined to the case of a contract made with knowledge of the insanity; see above, p. 862.

(*n*) *Thompson* v. *Leech*, 3 Salk. 300, 301; Bac. Abr. Idiots (F); *Niell* v. *Morley*, 9 Ves. 478, 481, 482.

(*o*) *Hall* v. *Warren*, 9 Ves. 605.

rescission of an executory contract made by a lunatic and remaining unperformed (*p*): but it would not interfere to set aside a contract made by a lunatic with one, who had no knowledge of his insanity, where the contract had been partly performed (*q*). The Court would, however, order the specific performance by a lunatic of a contract made whilst he was of sound mind (*r*). It is therefore submitted that, as lunatics' contracts made with persons dealing with them in good faith and without knowledge of their insanity are now recognised as valid at law, whether the contract be executed or executory (*s*), the Court should now enforce the specific performance by lunatics of such contracts; for under the old law and practice it was the supposed invalidity of the contract (*t*), and not the defendant's lunacy at the time of the proceedings to enforce it specifically, which prevented the Court from granting this relief. If a lunatic make a valid or voidable contract for the sale or purchase of land, and be so found by inquisition, the transaction may be confirmed and carried out, under the present practice, by order of the Master in Lunacy (*u*); and if the lunatic were the vendor, the land may be conveyed on completion of the contract by his committee acting under the Master's order on his behalf (*x*). If the lunatic be not so found by inquisition, but be a person, to whom the powers of management and administration given by the Lunacy Act, 1890 (*y*), apply, and were the vendor, the contract may be carried out in effect, if an order of the Master in Lunacy can be obtained for sale of the land and for its conveyance by such person as he shall direct (*z*).

(*p*) *Niell* v. *Morley,* 9 Ves. 478, 481; *Frost* v. *Beavan,* 22 L. J. Ch. 638; as to which, see 1 Dart, V. & P. 6, n. (*i*), 5th ed.; 7, n. (*h*), 6th ed.; 7, n. (*a*), 7th ed.

(*q*) *Niell* v. *Morley,* 9 Ves. 478.

(*r*) *Owen* v. *Davies,* 1 Ves. sen. 82; above, p. 530.

(*s*) Above, p. 862.

(*t*) See above, p. 863.

(*u*) See stats. 53 Vict. c. 5, s. 120, authorising orders for sale of lunatic's property to be made; 54 & 55 Vict. c. 65, s. 27 (1); *Re Smith,* L. R. 10 Ch. 79; *Baldwyn* v. *Smith,* 1900, 1 Ch. 588. It may be noted that if the Court in Lunacy confirm a lunatic's voidable contract for the sale or purchase of land, the lunatic's representatives will take the property, which is the fruit of the contract, in its converted state as personalty or realty; *Sergeson* v. *Sealey,* 2 Atk. 412; *Baldwyn* v. *Smith,* ubi sup.

(*x*) See stat. 53 Vict. c. 5, s. 124; above, p. 531.

(*y*) Stat. 53 Vict. c. 5, s. 116 (1); above, p. 531.

(*z*) See stats. 53 Vict. c. 5, ss. 120, 124; 54 & 55 Vict. c. 65, s. 27 (1); 8 Edw. VII. c. 47, s. 1, repealing and replacing sect. 116 (2) of 53 Vict. c. 5; above, p. 531.

But it does not appear that this Act confers any jurisdiction to order the performance of contracts made during their insanity by lunatics not so found; it only authorises orders directing the performance of their contracts made before their lunacy (*a*). And as regards lunatics not so found, it appears that the Court in Lunacy has no more than the jurisdiction expressly conferred upon it by the Lunacy Acts (*b*); although as regards lunatics so found by inquisition this Court is not limited to the powers so given, but may exercise the powers which it derives from the Royal prerogative (*c*) concerning lunatics and the management of their property (*d*). If therefore the Court in Lunacy will not make the order for sale, the purchaser will have no remedy but to sue for specific performance of the contract, and for an order that on payment of the purchase money the vendor may be declared a trustee and the land sold vested in himself (*e*). If the lunatic were the purchaser and be a person, to whom the above-mentioned powers of management are applicable, the contract may, it seems, be completed under an order of the Master in Lunacy, who is authorised to sanction the payment of the lunatic's debts or engagements (*f*). If such an order cannot be obtained, the vendor will be obliged to assert his rights by action.

Subsequent conveyance over for value without notice does not validate a lunatic's voidable conveyance.

Although a lunatic's conveyance made for valuable consideration to a person dealing with him in good faith and without notice of his insanity is valid (*g*), it does not appear that, where a lunatic's conveyance was originally voidable (*h*), it will be made valid by a subsequent conveyance from the alienee to a purchaser for value taking from him without notice of the lunacy. In this respect a lunatic's voidable conveyance seems to stand on the same footing as an infant's, the estate in the land conveyed revesting immediately on the avoidance of the

(*a*) Stat. 53 Vict. c. 5, s. 120 (i); above, p. 531.
(*b*) Above, p. 864, n. (*z*); see *Re Baggs*, 1894, 2 Ch. 416, n.; *Didisheim* v. *London and Westminster Bank*, 1900, 2 Ch. 15, 45; *Re Langdale*, 1901, 1 Ch. 3.
(*c*) Bac. Abr. Idiots (C); 1 Black. Comm. 303 *sq.*
(*d*) *Re Sefton*, 1898, 2 Ch. 378.
(*e*) See above, p. 511, n. (*z*); 3 Seton on Judgments, 2217, 7th ed.
(*f*) See stat. 53 Vict. c. 5, s. 117; below, p. 869.
(*g*) Above, p. 861. The ground of this rule of modern law seems to be that, if an insane man so conduct himself as to appear sane to a person of ordinary intelligence, he shall be estopped from alleging his insanity. Cf. the case of mistake, above, p. 742.
(*h*) Above, p. 861.

lunatic's act without any necessity for a reconveyance (*i*). And it is thought that, as in the case of conveyance by an infant (*k*), if a lunatic's voidable conveyance be avoided, the property thereby assured can be recovered without refunding any purchase money or other consideration received for making the conveyance. It appears, however, that where a lunatic's voidable conveyance has been made to persons who, acting in good faith with the sole object of securing his benefit, have incurred expenses or liabilities for his use in consideration thereof, the Court will, under its equitable jurisdiction, impose proper terms to secure their indemnity before lending its aid to set aside the conveyance or recover the property assured (*l*).

Sale of lunatic's lands irrespective of their contracts to sell them.

With respect to the sale of insane persons' lands irrespective of their own contracts to sell them, the Court in Lunacy may by order authorise the sale of any property belonging to any lunatic, to whom the powers of administration given by the Lunacy Act, 1890 (*m*), apply. And the Court may also order that any property of any such lunatic be sold, charged, mortgaged, dealt with or disposed of as the Court thinks most expedient for the purpose of raising or securing, or repaying with or without interest, money which is to be or which has been applied to all or any of the purposes following:—(1) Payment of the lunatic's debts or engagements; (2) discharge of any incumbrance on his property; (3) payment of any debt or expenditure incurred for the lunatic's maintenance or otherwise for his benefit; (4) payment of or provision for the expenses of his future maintenance (*n*). Under these powers, a lunatic's land may be sold in consideration of a rent-charge (*o*). But the simple power of sale given by sect. 120 of the Act does not authorise a sale in consideration of the receipt of shares in a company (*p*). Where a lunatic's lands are sold under the powers

(*i*) Above, pp. 8, 48. It is thought that the doctrine of a voidable conveyance being rendered unimpeachable by a subsequent conveyance to a purchaser for value without notice applies only where the first conveyance effectually passes the assuror's estate, leaving in him nothing but a right of action to set it aside, so that a re-conveyance is necessary, if the transaction be avoided; see above, pp. 748, 785, 848, n. (*o*).

(*k*) Above, p. 859.

(*l*) *Selby* v. *Jackson*, 6 Beav. 192, 204. Cf. above, p. 848.

(*m*) Stat. 53 Vict. c. 5, ss. 116 (1), 120 (a); above, p. 530.

(*n*) Stat. 53 Vict. c. 5, s. 117 (1).

(*o*) *Re Ware*, 1892, 1 Ch. 344.

(*p*) *Re A. B.*, 1899, W. N. 233. Cf. above, p. 251.

of this Act, the conveyance is executed on the lunatic's behalf by his committee, if he be found a lunatic by inquisition, or otherwise by such person as the Judge or Master in Lunacy may direct; and if so executed, will be effectual to convey the lunatic's estate therein (*q*). And the committee or such person may enter into the usual covenants for title on the lunatic's behalf, or, it seems, into any other covenants, which it would be usual and proper for the vendor to make (*r*). The Court in Lunacy is also empowered by order to authorise the committee of a lunatic so found, or such person as the Court appoints in the case of other lunatics or mental patients mentioned in the Lunacy Act, 1890 (*s*), to exercise any power or give any consent required for the exercise of any power, where the power is vested in the lunatic for his own benefit or the power of consent is in the nature of a beneficial interest in the lunatic (*t*); and also to exercise any power vested in the lunatic in the character of trustee or guardian, or give any consent of the lunatic necessary in the like character to the exercise of a power or as a check upon the undue exercise of the power (*u*). These provisions enable a general power of appointment given to a lunatic, or an express power of sale of lands vested in him as a trustee (and as a trustee only) (*x*), or a power to appoint new trustees to be exercised on his behalf (*y*). But since the Lunacy Act, 1890, only authorised the exercise on behalf of lunatics not so found by inquisition of the *powers of the Act* which were exercisable by the committee of the estate (*z*), it was held under that Act that the foregoing provisions did not enable the power of sale given by the Settled Land Act, 1882 (*a*), to be exercised on behalf of a lunatic not so found by inqui-

Exercise of powers on behalf of lunatics.

As to the power of sale under the Settled Land Act, 1882.

(*q*) See stat. 53 Vict. c. 5, s. 124; 8 Edw. VII. c. 47, s. 1, repealing and replacing 53 Vict. c. 5, s. 116 (2); above, pp. 530, 531.

(*r*) *Re Ray*, 1896, 1 Ch. 468.

(*s*) Above, pp. 530, 531.

(*t*) Stat. 53 Vict. c. 5, s. 120 (1). A lunatic's power to bar an estate tail is such a power and the property may be sold and conveyed so as to bar the entail, but the proceeds of sale should be resettled; *Re E. D. S.*, 1914, 1 Ch. 618.

Lunatic's estate tail.

(*u*) Sect. 128. See as to a power to appoint among children, *Re A.*, 1904, 2 Ch. 328; and as to the release of a power, *Re Hirst*, 1892, W. N. 177; *Re Rose*, 1894, 2 Ch. 348, 353.

(*x*) See *Re X.*, 1894, 2 Ch. 415, and the criticisms on that decision in *Re S. S. B.*, 1906, 1 Ch. 712.

(*y*) *Re Shortridge*, 1895, 1 Ch. 278; *Re Fuller*, 1900, 2 Ch. 551.

(*z*) 53 Vict. c. 5, s. 116 (2).

(*a*) Above, pp. 281 *sq.*

sition (*b*). It was also held, that they did not authorise the exercise, on behalf of a lunatic tenant for life not so found, of the power of sale given to tenants for life by sect. 7 of the Lands Clauses Act, 1845 (*c*), or of the tenant for life's liberty to consent to the sale of the settled land by trustees under a power of sale, to the exercise of which his consent was by sect. 56, sub-sect. 2, of the Settled Land Act, 1882 (*d*), required (*e*). The powers of sale given by sect. 7 of the Land Clauses Act, 1845 (*f*), are expressly made exercisable by the committee of a lunatic so found. And by the Settled Land Act, 1882 (*g*), where a tenant for life, or a person having the powers of a tenant for life under that Act is a lunatic *so found by inquisition*, the committee of his estate may, under an order of the Court in Lunacy (*h*), exercise on his behalf the powers of a tenant for life under that Act. By the Lunacy Act, 1908 (*i*), in the case of any of the persons to whom the powers of administration given by the Lunacy Act, 1890, apply (*j*), any powers exercisable by the committee of the estate of a lunatic so found may be exercised by such person as the Judge or Master may direct (*j*). Hence a tenant-for-life's powers under the Settled Land Act, 1882, of sale or consent to a sale, and any other power conferred on the committee by statute, such as that given by

(*b*) *Re Baggs*, 1894, 2 Ch. 416, n., approved, *Re S. S. B.*, 1906, 1 Ch. 712. But it was held that the powers of leasing given by the Settled Land Act, 1882, might be so exercised on behalf of a lunatic not so found; as the Lunacy Act, 1890, expressly authorises the execution of any power of leasing vested in a lunatic having a limited estate only in the property over which the power extends; stat. 53 Vict. c. 5, s. 120 (h); *Re Salt*, 1896, 1 Ch. 117; see *Re S. S. B.*, ubi sup.

(*c*) Stat. 8 & 9 Vict. c. 18; *Re S. S. B.*, 1906, 1 Ch. 712.

(*d*) Stat. 45 & 46 Vict. c. 38; see above, pp. 265-270.

(*e*) *Re De Moleyns and Harris' Contract*, 1908, 1 Ch. 110. The judgments in the case of *Re S. S. B.*, 1906, 1 Ch. 712, 717-719, 720, 729, discredited the decision in *Re X.*, 1894, 2 Ch. 415, where it was held that a power of sale limited by a settlement to be exercisable by the tenant for life with the consent of the trustees could be exercised under the Lunacy Act, 1890, on behalf of a lunatic tenant for life not so found. In *Re S. S. B.*, above, it was considered that such a power is not vested in the tenant for life either for his own benefit or exclusively as a trustee; and in *Re De Moleyns and Harris' Contract*, 1908, 1 Ch. 110, 114, it was considered that a tenant for life's liberty to consent to the exercise of a power of sale given to trustees, and exercisable only with his consent, was of the same nature and was not necessary as a check on the undue exercise of the power.

(*f*) Stat. 8 & 9 Vict. c. 18.

(*g*) Stat. 45 & 46 Vict. c. 38, s. 62; *Re Ray*, 1896, 1 Ch. 468.

(*h*) See stat. 53 Vict. c. 5, s. 108.

(*i*) 8 Edw. VII. c. 47, s. 1.

(*j*) See above, pp. 530, 531.

sect. 7 of the Land Clauses Act, 1845 (*k*), can now be exercised under the direction of the Court on behalf of lunatics not so found (*l*). In all the above-mentioned matters, the jurisdiction of the Court in Lunacy is now exercisable by the Masters (*m*).

Drunken persons.

The act *in pais* (*n*) of a man, who is so drunk as to be incapable of understanding its effect, is governed by the same law as the act of an insane person (*o*). Where a drunken man's act is done for valuable consideration under agreement with some other person, it is voidable at his option, if the other knew of his condition: but it is valid, if the other were not aware of and had no reasonable cause to suspect his defective state of mind and dealt with him in good faith. This doctrine is applicable to a drunken person's *purchase* or conveyance of land, and to his contract to sell or buy land (*p*). It is, however, questionable whether a drunken man's gratuitous conveyance is absolutely void, as a lunatic's is (*q*); for it seems that he might confirm it when sober (*r*).

§ 4.—*Convicts and outlaws.*

Convicts.

Convicts, that is, persons against whom judgment of death or penal servitude has been pronounced or recorded for treason or felony (*s*), are not under any incapacity to *purchase* land (*t*). And since the Forfeiture Act, 1870 (*u*), which abolished all

(*k*) Stat. 8 & 9 Vict. c. 18.

(*l*) See Heywood & Massey's Lunacy Practice, 246, 5th ed. It appears that the Act of 1908 does not alter the law with respect to the exercise, on behalf of a lunatic tenant for life, whether so found or not, of a power of sale given to him *by the settlement*, or of his liberty to consent to the exercise of a power of sale limited *by the settlement* to be exercisable by trustees with his consent; see n. (*j*), above.

(*m*) Stat. 54 & 55 Vict. c. 65, s. 27 (1); *Re Langdale*, 1901, 1 Ch. 3, 7; stat. 8 Edw. VII. c. 47, ss. 1, 2.

(*n*) See above, p. 847, n. (*l*).

(*o*) Above, p. 861.

(*p*) See *Matthews* v. *Baxter*, L. R. 8 Ex. 132; and cases cited above, p. 862, n. (*y*).

(*q*) Above, p. 861.

(*r*) See *Molton* v. *Camroux*, 4 Ex. 17, 19; *Matthews* v. *Baxter*, ubi sup.

(*s*) See stat. 33 & 34 Vict. c. 23, s. 6.

(*t*) See Co. Litt. 2b; Sug. V. & P. 685.

(*u*) Stat. 33 & 34 Vict. c. 23, s. 1. Conveyancers investigating title prior to the commencement of this Act, which was passed on the

attainder, forfeiture or escheat upon judgment for treason or felony, convicts may hold land. But by the same Act (*x*), convicts are incapable, while subject to the operation of the Act, of alienating or charging any property, or of making any contract, and are prohibited from bringing any action at law or in equity for the recovery of any property, debt or damage whatsoever. All these disabilities on the part of a convict are, however, suspended while he is lawfully at large under any licence (*y*). By the same Act, an administrator of any convict's property may be appointed by the Crown (*z*); and upon such appointment all the real and personal property to which the convict was at the time of his conviction, or shall while subject to the Act become entitled, shall vest in the administrator (*a*). The administrator has absolute power to let, mortgage, sell, convey and transfer any part of such property as to him shall seem fit (*b*). It is, however, provided that no property acquired by a convict while he is lawfully at large under any licence shall vest in his administrator, but the convict shall be entitled thereto without any interference on the administrator's part (*c*). Any property of the convict vested in his administrator revests in the convict or his representatives on his ceasing to be subject to the operation of the Act (*d*); this occurs on his death, bankruptcy, completion of his term of punishment or pardon (*e*).

Outlaws.

Outlawry is practically obsolete. Theoretically, however, a man may still be outlawed if he fly from justice upon criminal proceedings against him (*f*). Outlawry is a cause of forfeiture to the Crown of the outlawed person's goods and chattels, including his chattels real (*g*). An outlaw cannot therefore make

4th of July, 1870, should not forget that it may be necessary to take account of the previous law in this respect; as to which, see Wms. Real Prop. 49, 56, 324, 23rd ed., and authorities there cited.

(*x*) Sect. 8; above, p. 533.

(*y*) Stat. 33 & 34 Vict. c. 23, s. 30.

(*z*) Sect. 9.

(*a*) Sect. 10. Property vested in a convict on any trust or by way of mortgage is excepted: stat. 56 & 57 Vict. c. 53, s. 48.

Convict's estate tail.

(*b*) Sect. 12; *Carr* v. *Anderson*, 1903, 2 Ch. 279. The administrator has no power to bar the convict's estate tail, but the convict himself can do so; *Re Gaskell and Walters' Contract*, 1906, 2 Ch. 1; see above, p. 506, n. (*t*).

(*c*) Sect. 30.

(*d*) Sect. 18.

(*e*) Sect. 7.

(*f*) Short & Mellor's Crown Office Practice, 270, 2nd ed.; Wms. Pers. Prop. 102, and n. (*f*), 17th ed.

(*g*) Bac. Abr. Outlawry (D); 4 Black. Comm. 319, 387.

any valid disposition of his chattels after the title of the Crown to have them has accrued; and any previous disposition of them made with intent to avoid the forfeiture will be void (*h*). Since the Forfeiture Act, 1870 (*i*), judgment of outlawry for treason or felony no longer entails any attainder, and does not occasion any escheat to the lord or forfeiture to the Crown of the outlaw's freehold or copyhold estates of inheritance (*k*). But an outlaw still forfeits the profits of his real estate while he lives (*l*). Outlaws are not disabled from *purchasing* lands (*m*); and, except as prevented by the above-mentioned law of forfeiture, they are now free to hold and dispose of them. Outlaws are capable of making contracts and may be sued thereon: but as they cannot appear in Court to enforce any remedy for their own benefit, except to reverse the outlawry (*n*), they cannot enforce their agreements (*o*).

§ 5.—*Aliens.*

Aliens.

At common law, aliens (*p*) might *purchase*, but were incapable of inheriting lands, or of holding any estate therein; save only a lease for years of a house occupied by a friendly alien merchant (*q*). And the conveyance of any other estate in land to or in trust for (*r*) an alien was a cause of forfeiture of the

(*h*) See 3 Rep. 82b; 4 Black. Comm. 387, 388; *Perkins* v. *Bradley*, 1 Hare, 219, 227; *Chowne* v. *Baylis*, 31 Beav. 351, 356.

(*i*) Stat. 33 & 34 Vict. c. 23, s. 1; above, p. 869.

(*k*) See Wms. Real Prop. 49, 50, 56, 98, 115, n. (*p*), 202, 519, 23rd ed. By the Forfeiture Act, 1870, stat. 33 & 34 Vict. c. 23, s. 1, it is provided that nothing therein shall affect the law of *forfeiture* consequent upon outlawry. But it is thought that this exception relates only to the law of forfeiture of goods, and not to the forfeiture of freeholds in fee on outlawry for high treason; for such forfeiture was a consequence of the outlaw's attainder; see Bac. Abr. Outlawry (D); 4 Black. Comm. 381-387.

(*l*) Bac. Abr. Outlawry (D); Short & Mellor's Crown Office Practice, 271, 2nd ed.

(*m*) See Co. Litt. 2b.

(*n*) *Aldridge* v. *Buller*, 2 M. & W. 412; *Re Mander*, 6 Q. B. 867, 873; *R.* v. *Lowe*, 8 Ex. 697.

(*o*) Above, p. 2.

(*p*) As to what persons are aliens, and as to denizens, see Wms. Real Prop. 325, and n. (*b*), 23rd ed; stat. 4 & 5 Geo. V. c. 17, s. 1, and amending statutes in n. (*u*), p. 872, below. As to a company incorporated in England with alien shareholders, see *Daimler Co., Ld.* v. *Continental Tyre, &c., Ld.*, 1916, 2 A. C. 307.

(*q*) Co. Litt. 2b. By stat. 7 & 8 Vict. c. 66, s. 5, a resident alien, the subject of a friendly state, might hold lands for any term not exceeding twenty-one years for the purposes of residence or business.

(*r*) *Barrow* v. *Wadkin*, 24 Beav. 1; *Sharp* v. *St. Sauveur*, L. R. 7 Ch. 343; overruling *Rittson* v. *Stordy*, 3 Sm. & G. 230. But if lands

alien's interest to the Crown (*s*). Aliens were not, however, under any incapacity with respect to the acquisition, enjoyment or disposition of chattels personal (*t*). But since the Naturalization Act, 1870 (*u*), real and personal property of every description (*x*) may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject (*y*); and a title to real and personal property of every description may be derived through, from or in succession to an alien (*z*) in the same manner in all respects as through, from or in succession to a natural-born British subject. Aliens are not under any incapacity with respect to making contracts with British subjects; and friendly aliens may bring actions in the English Courts as well as British subjects (*a*). But alien enemies are disabled, so long as hostilities last (though no longer), from bringing or maintaining

Alien enemies.

were directed to be sold and the proceeds given to an alien, the Crown had then no claim; *Du Hourmelin* v. *Sheldon,* 1 Beav. 79, 4 My. & Cr. 525.

(*s*) Co. Litt. 2b; Wms. Real Prop. 326, 327, 23rd ed.

(*t*) *Calvin's case,* 7 Rep. 17a; And. 25; 1 Black. Comm. 372. It should, however, be noted that when a war breaks out between this country and any foreign state, all rights of property or contract conferred by English law on any subject of that state are regarded in law as being liable to confiscation and are only enjoyed, if at all, by the licence or permission of the Crown; 1 Black. Comm. 372; *Albretcht* v. *Sussmann,* 2 V. & B. 323, 327; *Clemontson* v. *Blessig,* 11 Ex. 135, 141; and cases cited above, p. 835, and in note (*e*), p. 873, below. And see *Wolff* v. *Oxholm,* 6 M. & S. 92; Cockburn on Nationality, 150; Hall's International Law, § 144, pp. 459 *sq.*, 7th ed.; *Hanger* v. *Abbott,* 73 U. S. (6 Wall.) 532, 536, 537.

(*u*) Stat. 33 Vict. c. 14, s. 2, passed 12th May, 1870, and amended by stats. 33 & 34 Vict. c. 102; 35 & 36 Vict. c. 39; and 58 & 59 Vict. c. 43; repealed and replaced by the British Nationality and Status of Aliens Act, 1914, 4 & 5 Geo. V. c. 17, s. 17. The Act of 1914 was amended by stats. 8 & 9 Geo. V. c. 38, and 12 & 13 Geo. V. c. 4 (the British Nationality, &c. Acts, 1918 and 1922). The Act of 1870 was not retrospective; *Sharp* v. *St. Sauveur,* L. R. 7 Ch. 343.

(*x*) Except British ships; stat. 4 & 5 Geo. V. c. 17, s. 17, replacing 33 Vict. c. 14, s. 14.

(*y*) See note (*p*), above, p. 871.

(*z*) All the King's natural-born subjects were enabled to trace their title by descent through their alien ancestors by stat. 11 & 12 Will. III. c. 6, explained by 25 Geo. II. c. 39, and repealed by the Naturalization Act, 1870, 33 Vict. c. 14, s. 18, and Sched., Part I. As to the present law, see the British Nationality and Status of Aliens Acts, 1914 to 1922, above, n. (*u*).

(*a*) Co. Litt. 129b; Dyer, 2b; Bac. Abr. Aliens (D); see *Johnstone* v. *Pedlar,* 1921, 2 A. C. 262, as to a friendly alien who violates his local allegiance. Aliens could not maintain real or mixed actions: but now that they may hold lands, they are entitled to recover them.

any action in an English Court (*b*), either in person or by agent (*c*). There is, however, an exception in the case of alien enemies resident in this country under the King's protection (*d*). Alien enemies are not under any personal incapacity of contracting with British subjects (*e*): but it is illegal to trade with the inhabitants of hostile states without the licence of the Crown; and contracts made in violation of this rule are void (*f*). And it seems that a contract made with an inhabitant of a hostile state to buy or sell land in England would fall within this rule, which extends to prohibit all intercourse, commercial or otherwise, which is inconsistent with a state of war, between the King's subjects and his enemies (*g*). But if such a contract were made

(*b*) Co. Litt. 129b; *Le Bret* v. *Papillon*, 4 East, 502; *Flindt* v. *Waters*, 15 East, 260; above, p. 2; *Alcinous* v. *Nigreu*, 4 E. & B. 217; *Porter* v. *Freudenberg*, 1915, 1 K. B. 857; *Halsey* v. *Lowenfeld*, 1916, 2 K. B. 707. But alien enemies may be sued as defendants and may appear and defend; *Robinson* v. *Continental Insce. Co. of Mannheim*, 1915, 1 K. B. 155; *Porter* v. *Freudenberg*, above; *Halsey* v. *Lowenfeld*, above. As to the position of alien enemies in the Prize Court, see *The Marie Glaeser*, 1914, P. 218; cf. *The Möwe*, 1915, P. 1. And see *Driefontein, &c.* v. *Janson*, 1901, 2 K. B. 419, affirmed, 1902, A. C. 484, where the objection was waived; and *Rodriguez* v. *Speyer*, 1919, A. C. 59, as to an exception in case of an action for winding up a partnership dissolved by war.

(*c*) *Brandon* v. *Nesbitt*, 6 T. R. 23. It appears that, where rights of action have accrued to aliens in time of peace and their remedies are suspended by the breaking out of war, any statute of limitations will continue to run against them during the war; for the cause of action is not affected and the right is regarded in law as being liable to confiscation; see *A.-G.* v. *Weeden*, Parker, 267; *Flindt* v. *Waters*, 15 East, 260, 266; *Rhodes* v. *Smethurst*, 6 M. & W. 351; *De Wahl* v. *Braune*, 25 L. J. Ex. 343, 344, 345; above, p. 872, n. (*t*); Pollock on Contract, 101, 9th ed. In the United States, however, it has been decided that statutes of limitations do not run in such circumstances during the war; *Hanger* v. *Abbott*, 73 U. S. (6 Wall.) 532; *Brown* v. *Hiatts*, 82 U. S. (14 Wall.) 177; L. Q. R. xx. 168. Interest-bearing debts owing to alien enemies continue to carry interest during the war; *Hugh Stevenson & Sons, Ld.* v. *Aktiengesellschaft für Cartonnagen*, 1918, A. C. 239, 245, 255, 256, 259. And by Art. 300 of the Treaty of Versailles the operation of statutes of limitation was to be treated as suspended, as between enemies, during the war.

(*d*) *Wells* v. *Williams*, 1 Ld. Raym. 282; *M'Connell* v. *Hector*, 3 B. & P. 113, 114; *Janson* v. *Driefontein, &c.*, 1902, A. C. 484, 506; *Princess Thurn and Taxis* v. *Moffitt*, 1915, 1 Ch. 58; *Schaffenius* v. *Goldberg*, 1916, 1 K. B. 284; see Co. Litt. 129b, n. (3); and consider the pleading in *Alcinous* v. *Nigreu*, 4 E. & B. 217.

(*e*) See *Antoine* v. *Morshead*, 6 Taunt. 237; *Daubuz* v. *Morshead*, ib. 332; *De Wahl* v. *Braune*, 1 H. & N. 178; Pollock on Contract, 101, 9th ed.

(*f*) *The Hoop*, 1 C. Rob. 196; *Potts* v. *Bell*, 8 T. R. 548; *Esposito* v. *Bowden*, 7 E. & B. 763; above, p. 835.

(*g*) See *McConnell* v. *Hector*, 3 B. & P. 113, 114; *Willison* v. *Patteson*, 7 Taunt. 439; *Esposito* v. *Bowden*, 7 E. & B. 763, 779; *Janson* v. *Driefontein, &c.*, 1902, A. C. 484, 489, 502, 509; above, p. 835.

with a hostile alien residing in this country under the King's protection, it would appear to be valid and enforceable on either side (*h*).

Effect of war on contracts made with aliens in time of peace.

Where a contract is made in time of peace with an alien resident in his own country, and war breaks out between that country and this before the time fixed for performance of the agreement, the contract is dissolved if its performance involve intercourse, commercial or otherwise, with the inhabitants of the hostile state (*i*), or would otherwise be detrimental to the public interests of this country (*k*). It appears, however, that, except in these conditions and provided that the nature of the agreement admit of its performance being delayed, the obligations arising from a contract so made with an alien are not discharged by the breaking out of war (*l*); though the alien's right to enforce the agreement is necessarily suspended by his incapacity to sue thereon during the continuance of hostilities (*m*). Rights under a contract which before the outbreak of war has given rise to interests in property, such as an interest under partnership articles (*n*), or under a lease (*o*), are not extinguished by the breaking out of war; though the alien enemy cannot enforce them during the war. And since a contract for the sale of land is not simply executory, but is in equity a conditional disposition of the land sold, which from the date of the contract is considered as belonging to the purchaser, subject to the vendor's duty of showing a good title and his lien for the price (*p*), it would seem that this contract is not dissolved by the outbreak of war—at any rate where time is not of the essence of the con-

(*h*) See notes (*d*), (*e*), above, p. 873.

(*i*) *Esposito* v. *Bowden*, 7 E. & B. 763; *Janson* v. *Driefontein, &c.*, 1902, A. C. 484, 509; *Zinc Corp., Ld.* v. *Hirsch*, 1916, 1 K. B. 541; *Halsey* v. *Lowenfeld*, 1916, 2 K. B. 707, 716; *Ertel, Bieber & Co.* v. *Rio Tinto Co.*, 1918, A. C. 260; and see *Distington Hematite Iron Co., Ld.* v. *Possehl & Co.*, 1916, 1 K. B. 811; above, p. 844.

(*k*) *Furtado* v. *Rodgers*, 3 B. & P. 191; *Gamba* v. *Le Mesurier*, 4 East, 407; *Brandon* v. *Curling*, ib. 410; *Janson* v. *Driefontein, &c.*, 1902, A. C. 484, 493, 494, 499, 502, 506 *sq.*; *Zinc Corp., Ld.* v. *Hirsch*, above; *Ertel, Bieber & Co.* v. *Rio Tinto Co.*, above; and see *Distington Hematite Iron Co., Ld.* v. *Possehl & Co.*, above.

(*l*) See cases cited in previous note; *Expte. Boussmaker*, 13 Ves. 71.

(*m*) Above, p. 872.

(*n*) *Stevenson & Sons, Ld.* v. *Aktiengesellschaft für Cartonnagen Industrie*, 1918, A. C. 239.

(*o*) *Halsey* v. *Lowenfeld*, 1916, 2 K. B. 707.

(*p*) Above, pp. 435, 480 *sq.*

tract—but the right to completion only is suspended (*q*). And it has been held that even completion may be effected where the enemy alien acts by an attorney appointed before he became such, and the purchase money is not made available for him during the war (*r*). A contract made with the inhabitant of a friendly state, which becomes a hostile state before the agreement is carried out, may lawfully be performed by the King's licence or permission, as where by royal authority a certain time is allowed after the commencement of hostilities for the performance of contracts previously made with residents in the enemy's country (*s*). As we have seen (*t*), rights of action, which have arisen in favour of an alien from the *breach* in time of peace of a contract made by him with an English subject, are not destroyed if war break out between his country and England; they are merely suspended, subject, apparently, to the operation thereon of any statute of limitations (*u*).

Performance by royal license or permission.

Special statutory provision with regard to the property of enemy aliens was made during the Great War. Under the Trading with the Enemy Amendment Act, 1914 (*x*), the High Court or a judge thereof might by order vest any such property (including any rights, whether legal or equitable, in or arising out of property, real or personal) in the Custodian—that is, for England and Wales, the Public Trustee (*y*)—and might by the order confer on the Custodian powers of selling, managing, and otherwise dealing with the property (*z*). Any such vesting order was to have the like purport and effect (*a*) as a vesting order as respects property of the same description under the Trustee Act, 1893 (*b*). Subject to interim directions and

Property of enemy aliens during the Great War.

(*q*) Consider the judgments of Lord Cozens-Hardy, M. R., and Warrington, L. J., in *Tingley* v. *Müller*, 1917, 2 Ch. 144, 157, 164, 165.

(*r*) *Tingley* v. *Müller*, above. The Treaty of Versailles (Germany) by the Annex to Sect. V. (Arts. 299-303) excepts from dissolution (a) contracts having for their object the transfer of estates or of real or personal property where the property therein had passed or the object had been delivered before the parties became enemies; (b) leases and agreements for leases of land and houses; (c) contracts of mortgage, pledge or lien.

(*s*) *Rucker* v. *Ansley*, 5 M. & S. 25; *Clemontson* v. *Blessig*, 11 Ex. 135; see also *Nigel Gold Mining Co.* v. *Hoade*, 1901, 2 K. B. 849.

(*t*) Above, p. 835.

(*u*) Above, p. 873, n. (*c*).

(*x*) Stat. 5 Geo. V. c. 12.

(*y*) Ibid. s. 1 (2).

(*z*) Ibid. s. 4 (1).

(*a*) Ibid. s. 4 (3).

(*b*) Stat. 56 & 57 Vict. c. 53; see above, pp. 510, 511, n. (*z*).

to authorised payments thereout, the Custodian was to hold the property so vested in him until the termination of the war (*c*), and was thereafter to deal with the same as directed by Order in Council (*d*). By the Trading with the Enemy (Custodian Direction) Order, 1921 (*e*), property held by the Custodian under the above Acts was made subject as from 31st Aug., 1921—that is, from the termination of the war—to the charges under the Treaty of Peace Acts (*f*) mentioned below. By the Trading with the Enemy (Amendment) Act, 1916 (*g*), similar powers of making vesting orders, with powers of sale, management and otherwise, were conferred on the Board of Trade.

The Treaty Charge.

By the Treaty of Peace Order, 1919 (*h*), all property, rights and interests within His Majesty's dominions or protectorates belonging to German nationals at the date when the Treaty with Germany came into force (not being property, rights or interests acquired under any general licence issued by or on behalf of His Majesty, and the net proceeds of their sale, liquidation or other dealings therewith) were charged with certain payments in favour of British nationals, but any particular property, rights or interests so charged might at any time, if His Majesty thought fit, be released from this charge (*i*)—usually

(*c*) Under the Termination of the Present War (Definition) Act, 1918, 8 & 9 Geo. V. c. 59, this was to be fixed by Order in Council, and 31st August, 1921, was the date so fixed; see above, p. 325, n. (*q*).

(*d*) Stat. 5 Geo. V. c. 12, s. 5 (1).

(*e*) S. R. & O. 1921, No. 1405, p. 1381; 65 Sol. J. 809.

(*f*) Stat. 9 & 10 Geo. V. c. 33 (Germany); 10 Geo. V. c. 6 (Austria and Bulgaria); 11 & 12 Geo. V. c. 11 (Hungary). These Acts empowered the Crown to make Orders in Council for giving effect to any of the provisions of the Treaties.

(*g*) Stat. 5 & 6 Geo. V. c. 105, s. 4; and see sect. 9 of this Act as to the validity of vesting orders made by the High Court or the Board of Trade.

(*h*) S. R. & O. 1919, No. 1517, Vol. II. 198; 64 Sol. J. p. 36.

(*i*) Ibid. clause 1 (xvi). The charge was created in pursuance of Art. 297 (b), Annex B (4) of the Treaty with Germany. The Order was amended by S. R. & O. 1920, No. 1410, Vol. II. 377; 64 Sol. J. 688 (which, among other things, provided that any particular property, rights or interests might be released from the charge by the Custodian acting under the general direction of the Board of Trade); and see S. R. & O. 1920, No. 2461, Vol. II. 379; 1921, No. 268, p. 865; No. 968, p. 866. The corresponding General Order for Austria and Amending Orders are S. R. & O. 1920, No. 1613, Vol. II. p. 426; 1921, No. 269, p. 875; No. 973, p. 876. And for Bulgaria, S. R. & O. 1920, No. 1614, Vol. II. p. 461; 1921, No. 270, p. 909; No. 974, p. 910. For Hungary, S. R. & O. 1921, No. 1285, p. 934. And the Treaty of

known as the Treaty Charge. With a view to making effective and enforcing the charge, it was provided that no person should, without the consent of the Custodian, part with or otherwise deal in any property, right or interest subject to the charge (*k*).

Alien enemies' disability of acquiring land between 23rd Dec., 1919 and 23rd Dec., 1922.

Provision was also made disabling former enemy aliens from acquiring land for a limited period. The Aliens Restriction (Amendment) Act, 1919 (*l*), provided that for three years from the passing of this Act—namely, 23rd Dec., 1919—it should not be lawful for a former enemy alien (*m*), either in his own name or in the name of a trustee or trustees, to acquire any land, or any interest in land, in the United Kingdom (*n*). If any such land or interest was acquired in contravention of the section, the Board of Trade might, on an application made to them for the purpose, by order vest the property in the Public Trustee, and any such order might contain provisions applying for the purposes of the order, with such modifications as the Board might think necessary, any of the provisions of sect. 4 of the Trading with the Enemy Amendment Act, 1916 (*o*), *i.e.*, powers of selling, managing, and otherwise dealing with the property (*p*). These provisions came to an end on the 23rd Dec., 1922; but they will continue to affect titles where a conveyance was, between 23rd Dec., 1919, and 23rd Dec., 1923, made to a German or other former enemy alien. It is thought that, while

Peace Orders (Amendment) Order, 1921, S. R. & O. 1921, No. 1644, p. 867, makes amendments to all the Orders as regards all those countries.

(*k*) Treaty of Peace Order, 1919, clause 1 (xvii). The charge in the case of a married woman's income which she is restrained from anticipating operates subject to the restraint, and there is no effective charge to deprive her of the instalments of income as they become due; *Re Rush*, 1923, 1 Ch. 26. And the Order does not prevent the making of a charging order for costs under sect. 28 of the Solicitors Act, 1860, 23 & 24 Vict. c. 127. As to when a person is of German nationality so as to render his property subject to the charge, see *Stoeck* v. *Public Trustee*, 1921, 2 Ch. 67; *Re Chamberlain's Settlement*, 1921, 2 Ch. 533; *Fasbender* v. *A.-G.*, 1922, 2 Ch. 850.

(*l*) Stat. 9 & 10 Geo. V. c. 92.

(*m*) See definition in sect. 15; speaking generally, citizens of Germany, Austria, Hungary, Bulgaria or Turkey.

(*n*) Sect. 11 (1); but not including a tenancy for a period not exceeding three years at a rack rent; sect. 10 (3).

(*o*) Stat. 5 & 6 Geo. V. c. 105. Sect. 4 conferred on the Board of Trade power to make vesting orders similar to those which might be made by the High Court under the Trading with the Enemy Act, 1914, 5 Geo. V. c. 12, and with the like powers; above, pp. 875, 876.

(*p*) Stat. 9 & 10 Geo. V. c. 92, s. 11 (2).

a contract for sale made during that period to such an alien was void as being illegal (*q*), yet a conveyance made during that time was effectual to pass the property, subject to the possibility of the Board of Trade making an order vesting it in the Public Trustee (*r*).

§ 6.—*Married women.*

Married women.

Every conveyancer must of course have a proper knowledge of the law concerning the relation of husband and wife in regard to property and contract. This is stated in other books, for which the writer is now responsible (*s*), and will not be fully repeated here. For our present purpose, the most important points are these:—By the common law, married women were enabled both to *purchase* (*t*) and to hold lands: but their estates in land were subject to the rights, which their husbands acquired therein (*u*); and they were incapable, as a rule, of alienating or affecting the same by their own act alone (*x*). They could only dispose of their freeholds by fine levied or recovery suffered with their husbands' concurrence, on which occasions they were examined apart to ascertain if their consent thereto

(*q*) See p. 838, above.

(*r*) Note that the Act says, not that the enemy alien shall be incapable of acquiring land, but that it shall not be lawful for him to do so; and that sect. 11 (2) contemplates that the alien may acquire the property in contravention of this prohibition; and see above, pp. 737, 832 *sq.*, 838, 839. The effect of the Act seems to be to reduce the enemy alien, during the period in question, to a condition analogous to his common law incapacity of holding but not of *purchasing* land; see above, p. 871. In cases where the name of a grantee suggests that he was a former enemy alien, but no definite information can be got, an inquiry of the Board of Trade would probably show whether an order had been or would be made. Apparently an order might be made after 23rd December, 1922, in respect of property acquired before that date.

(*s*) See Wms. Real Prop. 333 *sq.* (as to freeholds), 528, 531, 534, 538, 539 (as to copyholds), 574-576 (as to leaseholds), 23rd ed.; Wms. Pers. Prop. 532 *sq.* (as to chattels personal and contracts), 17th ed.

(*t*) Co. Litt. 3a, 356b. But a wife's *purchase* of land was voidable either by her husband, who might effectually disagree thereto, or by herself after the determination of the coverture, and notwithstanding that her husband had agreed thereto; or by her heirs, if she died without having agreed thereto when free from coverture; Co. Litt. ubi sup.; 2 Black. Comm. 292, 293; 3 Prest. Abst. 104, 107; cf. above, p. 846.

(*u*) See note (*s*), above.

(*x*) 1 Black. Comm. 442-444; Wms. Real Prop. 334, 336-338, 23rd ed.

were free (*y*). And a married woman could by a fine so levied by herself and her husband effectually assure, not only her legal, but her equitable estates (*z*) in freehold lands, and also any interest which she might have in such lands either at law or in equity (*a*); for example, her interest in the proceeds of sale of lands settled on trust for sale (*b*). A wife's legal estates or interests in copyholds were alienable in like manner by surrender in which her husband must concur, she herself being separately examined as to her consent (*c*). But it was doubtful in what manner her equitable estates or interests in copyholds were alienable (*d*); for the disposition of copyholds by surrender is properly applicable only to legal interests therein (*e*), and it was a question whether a fine levied by husband and wife would be a valid assurance of her equitable estate in copyhold land (*f*). The husband alone might dispose of his wife's leaseholds for years by act *inter vivos*, though not by will (*g*). It was established that a married woman might well exercise any power, whether appendant, in gross or collateral, and whether in respect of real or of personal estate, by herself alone as effectually as if she were a *feme sole;* unless she were restrained by the terms of the instrument creating the power from exercising it during her coverture. And this is the case whether the power were conferred upon her during her coverture or whilst she was single (*h*).

Wife's copyholds.

Wife's leaseholds.

Execution of powers by married women.

(*y*) Cruise on Fines and Recoveries, i. 107 *sq.*, 199 *sq.*, ii. 179, 3rd ed.; 1 Prest. Abst. 333, 2nd ed.; Wms. Real Prop. 337, 338, 23rd ed.

(*z*) *Goodrick* v. *Brown,* 1 Ch. Ca. 49; *Washbourn* v. *Downes,* ib. 213; *Clifford* v. *Ashley,* ib. 268; *Penne* v. *Peacock,* Ca. t. Talb. 41, 43; 1 Rop. Husb. & Wife, 140, 2nd ed.

(*a*) *Goodrick* v. *Shotbolt,* Prec. Ch. 333; *May* v. *Roper,* 4 Sim. 360; *Forbes* v. *Adams,* 9 Sim. 462; 1 Prest. Abst. 333, 2nd ed.; see also *Vick* v. *Edwards,* 3 P. W. 372; *Helps* v. *Hereford,* 2 B. & A. 242.

(*b*) *May* v. *Roper,* ubi sup.

(*c*) 1 Wat. Cop. 63; 1 Prest. Abst. 333, 2nd ed.; Wms. Real Prop. 528, 23rd ed.

(*d*) Williams on Seisin, 128.

(*e*) 1 Scriv. Cop. 262, 3rd ed. An exception was admitted in the case of an equitable estate tail in copyholds which might be barred by a surrender, in cases where a legal estate tail might be so barred; *Radford* v. *Wilson,* 3 Atk. 815; 1 Scriv. Cop. 77; 1 Wat. Cop. 239, 4th ed.

(*f*) See 1 Prest. Conv. 160; 1 Scriv. Cop. 87, 3rd ed.; Wat. Cop. i. 64, n., 181, n., ii. 42, n., 4th ed.

(*g*) Co. Litt. 46b, 351a; 1 Rop. Husb. & Wife, 173, 177, 2nd ed.; Wms. Real Prop. 574, 575, 23rd ed.

(*h*) Sug. Pow. 153-168, 8th ed.; *Doe* d. *Blomfield* v. *Eyre,* 3 C. B. 557, 578, 5 C. B. 713, 741, 748; *Wood* v. *Wood,* L. R. 10 Eq. 220; Wms. Real Prop. 302, 13th ed.; 422, 23rd ed.

Fines and Recoveries Act, 1833.

Fines and recoveries were abolished by the Fines and Recoveries Act, 1883 (*i*). This Act enabled (*k*) every married woman after that year, by deed executed with the concurrence of her husband and duly acknowledged by her as therein provided (*l*), to dispose of lands (*m*) of any tenure, and money subject to be invested in the purchase of lands (*m*), and also to dispose of, release, surrender or extinguish any estate (*n*) which she alone, or she and her husband in her right, might have in any lands (*m*) of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which might be vested in or limited or reserved to her in regard to any lands (*m*) of any tenure, or any such money as aforesaid, or in regard to any estate (*n*) in any lands (*m*) of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a *feme sole*.

Wife's copyholds.

From the disposing power so conferred, a married woman's *legal* estates or interests alienable by surrender in copyhold lands (*o*) were alone excepted (*p*). The Act therefore enabled every married woman to dispose by deed executed with her husband's concurrence, and duly acknowledged by her, of any legal or equitable estate or interest to which she was entitled in freehold hereditaments, and any *equitable* estate or interest to

(*i*) Stat. 3 & 4 Will. IV. c. 74, s. 2.

(*k*) Sect. 77. Disentailing assurances by married women being tenants in tail were excepted from this section, but were authorised by sect. 40, requiring the concurrence of the husband and acknowledgment of the deed by the wife to give effect thereto. Such acknowledgment might well be made after the enrolment of the disentailing deed and more than six months after its execution; *Ex parte Taverner*, 20 Beav. 490, 7 De G., M. & G. 627.

(*l*) Before the year 1883, the acknowledgment was required to be made before a judge of the superior Courts at Westminster, or of any County Court, or a Master in Chancery or two commissioners; and a certificate of the taking of the acknowledgment was required to be duly signed and filed, or else it would have been of no effect. But deeds executed by married women after the year 1882 may be acknowledged before one commissioner only; and a certificate of the acknowledgment of such deeds is not required. This distinction must be borne in mind in investigating title. See above, pp. 132, 133; stats. 3 & 4 Will. IV. c. 74, s. 79; 51 & 52 Vict. c. 43, s. 184, replacing 19 & 20 Vict. c. 108, s. 73; 45 & 46 Vict. c. 39, s. 7; *Jolly* v. *Handcock*, 7 Ex. 820.

(*m*) Including hereditaments of any tenure, whether corporeal or incorporeal, and any undivided share thereof; stat. 3 & 4 Will. IV. c. 74, s. 1.

(*n*) Including any interest, charge, lien, or incumbrance in, upon, or affecting any hereditaments, or any money subject to be invested in the purchase of hereditaments, either at law or in equity; ibid.

(*o*) Above, p. 879.

(*p*) Stat. 3 & 4 Will. IV. c. 74, s. 77.

which she was entitled in copyhold hereditaments (*q*). And it has been held that a wife may by such a deed make a binding disposition by way of declaration of trust of the equitable estate in any copyholds, of which she is the legal tenant on the court rolls subject to the old law (*r*). A wife's power to dispose of her legal interests in copyholds by surrender, in which her husband joined and on which she was separately examined (*s*), remained unaffected by the Act. And the Act further introduced an alternative method of alienation by married women of their equitable interests in copyholds (*t*); providing that such interests might also be disposed of by surrender, in which the husband should concur, and on which the wife should be separately examined (*u*). It was held that under the Fines and Recoveries Act a married woman could effectually dispose of her interest in the proceeds of sale of lands held on trust for sale (*x*); of the charge created in her favour by a mortgage made to her when single by deposit of the title deeds of land (*y*); of her interest under a settlement of personalty in land improperly purchased therewith (*z*); and even of her equitable reversionary life interest in a sum of money invested pursuant to the trusts of the settlement, under which she was entitled, on a mortgage of land (*a*). The Fines and Recoveries Act did not interfere in any way with the husband's power of alienating his wife's leaseholds by his own act *inter vivos* alone (*b*).

Land held on trust for sale.

Under the Fines and Recoveries Act (*c*), if a husband shall, in consequence of being a lunatic, idiot or of unsound mind, whether so found by inquisition or not, or shall from any other

Order dispensing with the husband's concurrence in case of his lunacy, &c.

(*q*) Williams on Seisin, 128; Wms. Real Prop. 534, 23rd ed.
(*r*) *Carter* v. *Carter*, 1896, 1 Ch. 62.
(*s*) Above, p. 878.
(*t*) Williams on Seisin, 128; Wms. Real Prop. 534, 535, 23rd ed.
(*u*) Stat. 3 & 4 Will. IV. c. 74, s. 90, also enacting that all such surrenders theretofore made should be valid; see above, p. 880.
(*x*) *Briggs* v. *Chamberlain*, 11 Hare, 69; *Tuer* v. *Turner*, 20 Beav. 560; *Re Jakeman's Trusts*, 23 Ch. D. 344. If, however, the lands so held had been actually sold, the wife no longer had an interest in land within the meaning of the Act, and could not avail herself of the disposing power thereby conferred; *Re Algeo*, I. R. 2 Eq. 485; *Miller* v. *Collins*, 1896, 1 Ch. 573, 577, 578.
(*y*) *Williams* v. *Cooke*, 4 Giff. 343.
(*z*) *Re Durrant and Stoner*, 18 Ch. D. 106; see above, p. 270.
(*a*) *Miller* v. *Collins*, 1896, 1 Ch. 573, diss. Kay, L. J., overruling *Re Newton's Trusts*, 23 Ch. D. 181.
(*b*) Above, p. 879.
(*c*) Stat. 3 & 4 Will. IV. c. 74, s. 91.

cause be incapable of executing a deed, or of making a surrender of copyholds, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife (*d*), either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, an order may be obtained, on the wife's application formerly to the Court of Common Pleas and now to the King's Bench Division (*e*) of the High Court, dispensing with the husband's concurrence in any case in which his concurrence is required by that Act or otherwise; and all acts, deeds or surrenders to be done, executed, or made by the wife, in pursuance of such order, in regard to lands (*f*) of any tenure, or in regard to money subject to be invested in the purchase of lands (*f*), shall be done, executed, or made by her in the same manner as if she were a *feme sole,* and when done, executed, or made by her shall (but without prejudice to the rights of the husband as then existing independently of the Act) be as good and valid as they would have been if the husband had concurred. It appears that, as a rule, such an order will only be made to give effect to some particular sale or other transaction agreed upon (*g*). Where a married woman has obtained an order of this kind, there is no necessity for her to acknowledge the deed as above provided (*h*): but her conveyance in pursuance of such order will not operate to assure her husband's interest in the lands during the continuance of the coverture, or it seems, his estate by the curtesy; it will only pass her own interest therein (*i*).

Wife's contingent interests, &c.

By the Real Property Act, 1845 (*k*), a married woman was enabled by deed executed with her husband's concurrence and acknowledged by her as aforesaid to dispose of a contingent, an executory and a future interest, and a possibility coupled with an interest (*l*) in any hereditaments, and of a right of entry (*m*), and to disclaim any estate or interest in any hereditaments.

Disclaimer.

(*d*) See *Expte. Robinson,* L. R. 4 C. P. 205; *Re Caine,* 10 Q. B. D. 284.
(*e*) *Re Giles,* 1894, W. N. 73, 70 L. T. 757.
(*f*) See above, p. 880, n. (*n*).
(*g*) *Re Graham,* 19 C. B. N. S. 370; see *Re Hart,* 1882, W. N. 36; above, n. (*e*).
(*h*) *Goodchild* v. *Dougal,* 3 Ch. D. 650.
(*i*) *Fowke* v. *Draycott,* 29 Ch. D. 996.
(*k*) Stat. 8 & 9 Vict. c. 106, ss. 6, 7; see above, p. 878, n. (*t*).
(*l*) See Wms. Real Prop. 398, 399, 436, 23rd ed.
(*m*) See above, pp. 387-390, 837, n. (*x*).

Wife's separate estate.

What is written above (*n*) concerning the alienation of married women's equitable estates or interests in land applies only to property not settled for their separate use (*o*). If any estate or interest in land were settled on trust for the separate use of a married woman, she could dispose of her equitable interest in such property as effectually as if she were a single woman, both by act *inter vivos* and by will (*p*), and not only by conveyance or contract dealing specifically therewith, but also in consequence of her general engagements entered into with respect to the same (*q*). Where any land so settled was not vested in trustees, but was limited to the wife directly for her separate use, her husband would take such estate or interest therein as the common law allowed him, but in equity he would be a trustee thereof for his wife's benefit; and in such case, although the wife alone could dispose of her equitable interest in the property, the legal estate therein could only be effectually assured by deed executed with the husband's concurrence and duly acknowledged by her, or by other means appropriate at law to the nature of the estate settled (*r*). If, however, property were settled on trust for the separate use of a married woman, with a proviso that she should have no power to anticipate the income thereof, she was incapable of alienating her interest therein except by will, so long as she was under any coverture (*s*); and it could not be affected by her general engagements (*t*). If a married woman were entitled to an equitable estate tail in any lands as her separate estate, and desired to bar the entail, it was required by the Fines and Recoveries Act (*u*) that her husband should concur in the disentailing deed and that she should duly acknowledge the same. If she were so entitled subject to a restraint on anticipation, that did not prevent her from so

Restraint on alienation.

Wife's equitable estate tail being her separate estate.

(*n*) Pp. 878 *sq.*

(*o*) See *Taylor* v. *Meads*, 4 De G., J. & S. 597, 604, 605; Wms. Real Prop. 340, 23rd ed.

(*p*) *Taylor* v. *Meads*, 4 De G., J. & S. 597; see *Willock* v. *Noble*, L. R. 7 H. L. 580; Wms. Real Prop. 340 *sq.*, 23rd ed.

(*q*) *Johnson* v. *Gallagher*, 3 De G., F. & J. 494; *Pike* v. *Fitzgibbon*, 17 Ch. D. 454.

(*r*) *Hall* v. *Waterhouse*, 5 Giff. 64; see above, pp. 878 *sq.*

(*s*) *Tullett* v. *Armstrong*, 1 Beav. 1, 4 My. & Cr. 390; *Baggett* v. *Meux*, 1 Ph. 627; *Cooper* v. *Macdonald*, 7 Ch. D. 288; *Bateman* v. *Faber*, 1898, 1 Ch. 144; see Wms. Real Prop. 342, 343, 23rd ed.; Wms. Pers. Prop. 546, 547, 17th ed.

(*t*) *Pike* v. *Fitzgibbon*, 17 Ch. D. 454.

(*u*) Stat. 3 & 4 Will. IV. c. 74, s. 40; above, p. 880, n. (*k*).

barring the entail. It appears, however, that the restraint was not thereby defeated, but continued to affect the estate in fee simple, into which her estate tail was enlarged (*x*).

Removal of a restraint on anticipation.

Formerly, the Court had no power to interfere by its order with the effect of a restraint upon alienation attached to any property settled for the separate use of a married woman, however beneficial to her such an interference might have been (*y*). But by the Conveyancing Act, 1881 (*z*), notwithstanding that a married woman was restrained from anticipation, the Court might, if it thought fit, where it appeared to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property (*a*). This enactment is now repealed and replaced by sect. 7 of the Conveyancing Act, 1911 (*b*), which extends the power of the Court, if it thinks fit, to bind a married woman's interest, by judgment or order, where it appears to the Court to be for her benefit, and with her consent, to every case where she is restrained from anticipation, or from alienation in respect of any property or any interest in property, or is by law unable to dispose of or bind such property or her interest therein, including a reversionary interest arising under her marriage settlement (*c*). The Court is thus enabled, not only to remove a restraint on anticipation, but also to bind a married woman's interest in property, to which she is entitled at common law, and with the disability of alienation imposed by the rules of the common law (*d*) or (as it seems) with a restraint on or disability of alienation imposed by some statute.

Extended power of the Court to bind a wife's property which she is in any way incapable of alienating.

Married Women's Property Act, 1870.

Originally, a trust of lands for the separate use of a married woman could only arise by act of parties; as by ante-nuptial contract between husband and wife, or by the express provision of those by whom the property was bestowed (*e*). The Married

(*x*) *Cooper* v. *Macdonald*, 7 Ch. D. 288.
(*y*) *Robinson* v. *Wheelwright*, 21 Beav. 214, 6 De G., M. & G. 535.
(*z*) Stat. 44 & 45 Vict. c. 41, s. 39.
(*a*) The Court has been exceedingly chary of exercising the jurisdiction so conferred; *Re Little*, 40 Ch. D. 418; *Re Pollard's Settlement*, 1896, 1 Ch. 901, 2 Ch. 552; *Re Blundell*, 1901, 2 Ch. 221.
(*b*) Stat. 1 & 2 Geo. V. c. 37.
(*c*) The cases cited in note (*a*), above, appear to be relevant to the exercise of this jurisdiction.
(*d*) See above, pp. 878 *sq.*; Wms. Real Prop. 333-338, 23rd ed.; Wms. Pers. Prop. 532-544, 17th ed.
(*e*) Wms. Real Prop. 344, 23rd ed.

Women's Property Act, 1870 (*f*), provided that, subject and without prejudice to the trusts of any settlement affecting the same, the following property acquired during her marriage by any woman married after the passing of that Act should belong to her for her separate use; namely, any personal property (*g*) to which she might become entitled as next of kin or one of the next of kin of an intestate (*h*), and the rents and profits of any freehold, copyhold or customaryhold property which should descend upon her as heiress or co-heiress of an intestate (*i*). This Act did not confer upon married women, or enable them to dispose of, any separate legal estate in the property so secured to them, but only gave them the same equitable interest as they would have enjoyed under an express trust for their separate use, together with the power of alienation incident in equity thereto (*k*).

Judicial separation.

By the Divorce Acts of 1857 and 1858 (*l*), in every case of a judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a *feme sole* with respect to (1) property of every description which she may acquire or which may come to or devolve upon her (*m*), (2) property to which she has become or shall become entitled as executrix, administratrix or trustee since the sentence of separation, and (3) property of or to which she is possessed or entitled for an estate in remainder or reversion (*n*) at the date of the decree; and all such property may be disposed of by her in all respects as a *feme sole*, and shall, if she shall die intestate, go as the same would have gone had her husband been then dead; provided that if she shall again cohabit with her husband,

(*f*) Stat. 33 & 34 Vict. c. 93, passed 9th August, 1870.
(*g*) Including, of course, chattels real.
(*h*) Sect. 7.
(*i*) Sect. 8, which only gives the rents and profits, and not the fee simple, of such property for her separate use; *Johnson* v. *Johnson*, 35 Ch. D. 345.
(*k*) *Howard* v. *Bank of England*, L. R. 19 Eq. 295, 300, 301; *Johnson* v. *Johnson*, 35 Ch. D. 345, 349; Wms. Conv. Stat. 377-382.
(*l*) Stats. 20 & 21 Vict. c. 85, s. 25; 21 & 22 Vict. c. 108, ss. 7, 8.
(*m*) It has been held that under these words the wife has the right to receive or recover any chose in action, to which she was entitled but which had not been reduced into possession at the time of the decree; *Johnson* v. *Lander*, L. R. 7 Eq. 228; *Re Coward and Adam's Purchase*, L. R. 20 Eq. 179; *Nicholson* v. *Drury, &c. Co.*, 7 Ch. D. 48.
(*n*) These words appear to include a reversion expectant on a lease for years; see Wms. Real Prop. 362, 363, 23rd ed.

all such property as she may then be entitled to shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate. Under these enactments, the wife can, during the separation, dispose as a *feme sole* (without the necessity of her husband's concurrence or of acknowledgment) of all estates or interests in land, to which she may become entitled after the date of the decree (*o*), notwithstanding that the same were given to her without power of anticipation (*p*); and also of all estates in remainder or reversion (*q*), to which she is entitled at the time of the decree, whether the same have fallen into possession or not (*r*). But the Acts give her no power to dispose of any estates or interests to which she is entitled in possession, and not in reversion nor in action (*s*), at the time of the decree; so that if at that time she were entitled in possession to lands settled for her separate use without power of anticipation, the Acts do not remove the restraint, and she can no more alien the lands during the separation than she could whilst living with her husband (*t*). Under the same Acts (*u*), where a wife deserted by her husband has obtained a protection order, she is during the continuance of the order and as from the date of the desertion (*x*), in the like position in all respects with regard to property as if she had obtained a decree of judicial separation. By the Summary Jurisdiction (Married Women) Act, 1895 (*y*), a separation order made thereunder shall while in force have the effect in all respects of a decree for judicial separation on the ground of cruelty.

Protection order.

Separation order.

Effect of divorce.

When an absolute decree has been made under the Divorce Acts (*z*) for the dissolution of a marriage, all the rights which

(*o*) *Re Hughes*, 1898, 1 Ch. 529.

(*p*) *Cooke* v. *Fuller*, 26 Beav. 99; *Munt* v. *Glynes*, 20 W. R. 823; *Waite* v. *Morland*, 38 Ch. D. 135, 138.

(*q*) See note (*n*), above, p. 885.

(*r*) See *Re Insole*, L. R. 1 Eq. 470, 473.

(*s*) See note (*m*), above, p. 885.

(*t*) *Waite* v. *Morland*, 38 Ch. D. 135; *Hill* v. *Cooper*, 1893, 2 Q. B. 85.

(*u*) Stats. 20 & 21 Vict. c. 85, s. 21; 21 & 22 Vict. c. 108, ss. 8, 9.

(*x*) *Bathe* v. *Bank of England*, 4 K. & J. 534, 538; *Re Kingsley's Trusts*, 26 Beav. 84; *Cooke* v. *Fuller*, ib. 99; *Re Elliott*, L. R. 2 P. & M. 274; *Waite* v. *Morland*, 38 Ch. D. 135, 138.

(*y*) Stat. 58 & 59 Vict. c. 39, ss. 4, 5, extended by 2 Edw. VII. c. 28, s. 5 (1).

(*z*) Stats. 20 & 21 Vict. c. 85, ss. 27-31, 57; 23 & 24 Vict. c. 144, s. 7; 25 & 26 Vict. c. 81; 29 & 30 Vict. c. 32, s. 3. In the interval

the former husband and wife previously enjoyed in respect of each other's property, independently of the provisions of any settlement, are immediately extinguished (*a*). Thus if the divorced persons were entitled to lands at common law as tenants by entireties (*b*), they become joint tenants, having the same respective interests as if they were strangers, upon the dissolution of the marriage (*c*). So if the divorced wife were entitled at common law to an estate in fee simple in freeholds, all the husband's previously existing estate or interest therein, whether during the joint lives only or as tenant by the curtesy potential or initiate, would be at an end; and she could thenceforth enjoy and convey the same as a single woman without his interference or concurrence (*d*). The husband would be equally deprived of all interest in the wife's copyholds (*d*). And if the wife were entitled at common law to a term of years, the husband's interest therein would be as effectually extinguished as if he had died in her lifetime without making any disposition thereof (*d*). The husband also loses by divorce all his right to succeed to his wife's chattels upon her death and intestacy (*e*). And the wife loses her right to succeed on the husband's death and intestacy to a part of his chattels (*f*). But divorce only extinguishes the rights which were given to the parties in each other's property by the rules of common law or equity in virtue of their relation of husband and wife. And it is now established that a decree for the dissolution of a marriage does not deprive either party of any interest in any property which is limited

between the making of a decree *nisi* and a decree absolute for the dissolution of a marriage, the wife remains a married woman; *Norman* v. *Villars*, 2 Ex. D. 359; and this interval is "during the coverture" within a covenant to settle after-acquired property; *Sinclair* v. *Fell*, 1913, 1 Ch. 155; but the husband is not entitled to exercise his marital rights in respect of her property to her prejudice; *Prole* v. *Soady*, L. R. 3 Ch. 220; *Allcard* v. *Walker*, 1896, 2 Ch. 369, 384; and when the decree absolute has been pronounced, the marriage is dissolved as from the date of the decree *nisi*; *Tremayne* v. *Rashleigh*, 1908, 1 Ch. 681, 694.

(*a*) *Wells* v. *Malbon*, 31 Beav. 48; *Wilkinson* v. *Gibson*, L. R. 4 Eq. 162; *Prole* v. *Soady*, L. R. 3 Ch. 220; *Codrington* v. *Codrington*, L. R. 7 H. L. 854; *Thornley* v. *Thornley*, 1893, 2 Ch. 229.

(*b*) See Wms. Real Prop. 339, 23rd ed.

(*c*) *Thornley* v. *Thornley*, 1893, 2 Ch. 229.

(*d*) This follows from the principle laid down in the cases cited in note (*a*), above.

(*e*) *Wilkinson* v. *Gibson*, L. R. 4 Eq. 162; *Re Wallas*, 1905, P. 326.

(*f*) *Re Nares*, 13 P. D. 35.

by any settlement to him or her by name (*g*). If, however, the wife were so entitled under any settlement, but without power of anticipation, the restraint on anticipation would cease to be operative after the divorce; as the wife is thereby made single. But of course the restraint would revive, if it were not limited to the particular coverture dissolved, and the woman were to marry again without having disposed of the property in the interval (*h*). It appears that upon divorce either party loses any interest in property which was limited to him or her, not by name, but under the description of the husband or wife of the other; for he or she then ceases to answer that description (*i*).

Nullity of marriage, effect of decree of.

The effect of a decree of nullity of marriage on the ground of the canonical disability of impotence is to render the marriage void, and appears to resemble the effect of a divorce as regards the extinguishment of the parties' common law rights in each other's property (*k*); for the marriage was voidable only, and was binding on the parties until they were released by the decree (*l*). And property conveyed by either spouse to the other during the continuance of the marriage as a gift or advancement cannot be recovered back on the pronouncement of such a decree (*m*). But the consequences of such a decree differ from those of a divorce with respect to interests limited by any settlement made in consideration of the marriage to take effect in the parties' favour after the solemnization thereof; as these interests are avoided upon the pronouncement of the decree, no

(*g*) *Fitzgerald* v. *Chapman,* 1 Ch. D. 563; *Burton* v. *Sturgeon,* 2 Ch. D. 318; and see *Re Crawford's Settlement,* 1905, 1 Ch. 11. The Court has power, after a decree of nullity or dissolution of marriage, to make an order varying the provisions of any ante-nuptial or post-nuptial settlement which has been made on the parties, for the benefit either of the children of the marriage or of their parents; see stats. 22 & 23 Vict. c. 61, s. 5; 41 Vict. c. 19, s. 3; Wms. Pers. Prop. 582, 17th ed.

(*h*) See cases cited above, p. 883, n. (*s*). The Court has jurisdiction, on making an order for the variation of a settlement after a decree for dissolution, to remove a restraint on anticipation; *Churchward* v. *Churchward,* 1910, P. 195.

(*i*) *Re Morrieson,* 40 Ch. D. 30, Kay, J., declining to follow *Bullmore* v. *Wynter,* 22 Ch. D. 619, Fry, J.

(*k*) Above, p. 887; and see note (*g*), above.

(*l*) See 1 Black. Comm. Ch. 15; 3 Black. Comm. 92-94; Burn's Eccl. Law, ii. 500, 9th ed.; stat. 20 & 21 Vict. c. 85, ss. 6, 22; *Cavell* v. *Prince,* 35 L. J. Ex. 162; *A.* v. *B.*, L. R. 1 P. & M. 559; *Dunbar* v. *Dunbar,* 1909, 2 Ch. 639, 644.

(*m*) *Dunbar* v. *Dunbar,* ubi sup.

valid marriage having taken place (*n*). When a marriage is void for some *legal* disability, that is, any impediment raised by common law or statute to the formation of a valid marriage (*o*)—such as the existence of a previous marriage (*p*) or of such relationship between the parties as brings them within the prohibited degrees of consanguinity or affinity (*q*)—the marriage is altogether void *ab initio*, and the parties have never occupied the position of husband and wife or acquired the rights resulting therefrom (*r*). So that a decree of nullity on the ground of some *legal* disability has no effect in dissolving the marriage tie; it is not necessary to establish, but is merely declaratory of, the invalidity of the marriage (*s*).

Married woman bare trustee.

Since the Vendor and Purchaser Act, 1874 (*t*), now replaced in this respect by the Trustee Act, 1893 (*u*), when any freehold or copyhold hereditament is vested in a married woman as a bare trustee (*x*) she may convey or surrender it as if she were a *feme sole*.

Married Women's Property Act, 1882.

By the Married Women's Property Act, 1882 (*y*), which came into operation on the 1st of January, 1883 (*z*), a married woman is capable of acquiring, holding and disposing, by will or otherwise, of any real or personal property, in the same manner as if she were a *feme sole*, without the intervention of any trustee. Every woman married after the commencement of the Act is entitled to hold and dispose of, as her separate

(*n*) *Dormer* v. *Ward*, 1901, P. 20; *Re Wombwell's Settlement*, 1922, 2 Ch. 298. The Court has nevertheless power to vary the settlements; *S. C.*; see above, n. (*g*), p. 888.

(*o*) 1 Black. Comm. 435 *sq.*

(*p*) *Birt* v. *Boutinez*, L. R. 1 P. & M. 487.

(*q*) This was made a legal disability by stat. 5 & 6 Will. IV. c. 54, s. 2; see 1 Black. Comm. 434; *R.* v. *Chadwick*, 11 Q. B. 173; *Brook* v. *Brook*, 9 H. L. C. 193.

(*r*) See *Expte. Naden*, L. R. 9 Ch. 670; *Dunbar* v. *Dunbar*, 1909, 2 Ch. 639, 644. The former case and those cited in the previous note relate to pretended marriage with a deceased wife's sister before stat. 7 Edw. VII. c. 47. As to settlements executed in consideration of such marriages, see *Pawson* v. *Brown*, 13 Ch. D. 202; *Phillips* v. *Probyn*, 1899, 1 Ch. 811; stat. 7 Edw. VII. c. 47, s. 2; cf. *Ayerst* v. *Jenkins*, L. R. 16 Eq. 275.

(*s*) *Birt* v. *Boutinez*, L. R. 1 P. & M. 487.

(*t*) Stat. 37 & 38 Vict. c. 78, s. 6, passed 7th Aug. 1874.

(*u*) Stat. 56 & 57 Vict. c. 53, s. 16.

(*x*) See above, p. 203, n. (*b*), as to the meaning of this term.

(*y*) Stat. 45 & 46 Vict. c. 75, s. 1, sub-s. 1.

(*z*) Sect. 25.

property, all real and personal property which belonged to her at the time of marriage, or shall be acquired by or devolve upon her after marriage (*a*). And every woman married before the commencement of the Act is entitled to hold and dispose of, as her separate property, all real and personal property, to which her title, whether vested or contingent and whether in possession, reversion or remainder, has accrued after the commencement of the Act (*b*). But the Act is not to interfere with any settlement made or to be made respecting the property of any married woman, or to interfere with or render inoperative any restriction against anticipation attached or to be attached to the enjoyment by a married woman of any property or income (*c*).

Construction of the Married Women's Property Act, 1882.

Under this Act, it has been decided, with respect to women married before the year 1883, that where they were before that year entitled to any property, either contingently or in reversion or remainder, it does not become their separate property by reason of their interests vesting or falling into possession after the commencement of the Act (*d*). As regards such property and any property to which they were entitled in possession before that year, they remain subject to the law in force before the Act. But any property given since the commencement of the Act to any married woman beneficially, and not as a trustee or an executrix (*e*), belongs to her as her separate property, although not expressly limited for her separate use (*f*). It was, however, held, upon the construction of the proviso that the Act shall not interfere with or affect any settlement made or to be made respecting the property of any married woman (*g*), that a covenant by a husband alone contained in a settlement made before the Act to settle his wife's after-acquired property, would bind property to which she might become entitled after the Act, to the same extent as such property would have been bound by the husband's covenant at common law, unless the

(*a*) Sect. 2.
(*b*) Sect. 5.
(*c*) Sect. 19.
(*d*) *Reid* v. *Reid*, 31 Ch. D. 402, overruling *Baynton* v. *Collins*, 27 Ch. D. 604, and *Re Thompson and Curzon*, 29 Ch. D. 177; *Re Bacon*, 1907, 1 Ch. 475.
(*e*) *Re Harkness and Allsopp's Contract*, 1896, 2 Ch. 358.
(*f*) *Re Lumley*, 1896, 2 Ch. 690; see also *Re Davenport*, 1895, 1 Ch. 361.
(*g*) Stat. 45 & 46 Vict. c. 75, s. 19.

property were expressly given for her separate use (*h*). And it appears that the same construction may be placed upon a similar covenant contained in a settlement made since the Act but before the year 1908; for it was further decided that an ante-nuptial settlement made after the Act by an intended husband and infant wife of her personal property had the same effect as it would have had at common law, and was therefore completely binding on the wife as regards any interest therein of which the husband could by virtue of his marital rights at common law have made a valid disposition (*i*). It is, however, now provided by the Married Women's Property Act, 1907 (*k*), that notwithstanding sect. 19 of the Act of 1882 (*l*), a settlement or agreement for a settlement made after the year 1907 (*m*) by the husband or intended husband, whether before or after marriage, respecting the property of any woman he may marry or have married, shall not be valid unless it is executed by her if she is of full age, or confirmed by her after she attains full age; but if she dies an infant any covenant or disposition by her husband contained in the settlement or agreement shall bind or pass any interest in any property of hers to which he may become entitled on her death and which he could have bound or disposed of if this Act had not been passed (*n*).

Amending Act of 1907.

Wife's estate in her separate property.

Where under the Act of 1882 a married woman becomes entitled to any estate or interest in any lands or hereditaments as her separate property, she takes the whole legal or other estate or interest limited to her in the same manner as if she were a single woman; and her husband does not acquire the rights and interest therein during his wife's lifetime which he would have had if she had been entitled independently of the Act, either at common law or in equity but not for her separate use (*o*). But he may succeed after her death, if she die intestate,

(*h*) *Re Stonor's Trusts*, 24 Ch. D. 195; *Re Whitaker*, 34 Ch. D. 227; *Hancock* v. *Hancock*, 38 Ch. D. 78; see Wms. Pers. Prop. 432, 558, 17th ed.

(*i*) *Stevens* v. *Trevor-Garrick*, 1893, 2 Ch. 307; *Buckland* v. *Buckland*, 1900, 2 Ch. 534; see Wms. Pers. Prop. 432, 558, 17th ed.

(*k*) Stat. 7 Edw. VII. c. 18, s. 2, sub-ss. 1, 2. By sub-s. 3, nothing in this section shall render invalid any settlement or agreement for a settlement made or to be made under the provisions of the Infant Settlements Act, 1855; see above, p. 852.

(*l*) Above, pp. 890, 891. (*m*) Stat. 7 Edw. VII. c. 18, s. 4.

(*n*) See above, n. (*k*).

(*o*) See *Hope* v. *Hope*, 1892, 2 Ch. 336, 341; *Thornley* v. *Thornley*, 1893, 2 Ch. 229; *Re Lumley*, 1896, 2 Ch. 690; Wms. Conv. Stat. 382, 383, 418, 419, 421.

to her freehold or copyhold estate in fee simple as tenant by the curtesy (*p*), and to her leaseholds for years in virtue of her marital right to take the same by survivorship (*q*). The wife can dispose of any estate or interest, to which she so becomes entitled as her separate property, in the same manner as if she were single, without the necessity of her husband's concurrence in or her own acknowledgment of the deed of conveyance, or of any other formality not required in the case of an assurance by a single woman (*r*). Although, if any such property be given to a married woman with a restraint on anticipation, she is under the like incapacity to deprive herself of the benefit thereof by any disposition, which she may purport to make, as attached with respect to her dealing with her equitable separate estate subject to a similar restraint (*s*). It appears, however, that where a wife enjoys a *legal* estate or interest by virtue of the Act of 1882 in any separate property, subject to a restraint on anticipation, and disposes of the property to a purchaser taking for value in good faith and without notice of the restraint, the purchaser will obtain a good title to the property; for the restraint on alienation is an incumbrance affecting the property in equity only and not at law (*t*). Since the commencement of the Act of 1882, a married woman can disclaim any property before she has done anything to accept it, notwithstanding that it is given to her subject to a restraint on anticipation (*u*).

Wife's dispositions thereof.

Restraint on alienation.

Sale without notice of a restraint on anticipation.

Disclaimer of property given with such restraint.

The Act confers on married women a special, not a general, capacity to

It is held that the Act of 1882 confers upon married women a special capacity only to hold and dispose of property, which is by virtue of the Act made their separate property, and does not invest them with the same general capacity in respect of

(*p*) *Hope* v. *Hope*, 1892, 2 Ch. 336; see above, p. 198; Wms. Real Prop. 334, 335, 344, 23rd ed.

(*q*) After the coverture has come to an end, the quality of separate property also ceases, and the husband can assert his common law right to have his wife's term by survivorship without the necessity of taking out administration to her: see Co. Litt. 46b, 300a, 351a; 2 Black. Comm. 433-435; *Re Lambert's Estate*, 39 Ch. D. 626; *Surman* v. *Wharton*, 1891, 1 Q. B. 491; *Hope* v. *Hope*, ubi sup.

(*r*) *Re Drummond and Davie's Contract*, 1891, 1 Ch. 524, deciding that a wife can now bar the entail in any lands to which she is entitled for an estate tail as her separate property, without her husband's concurrence in or her own acknowledgment of the disentailing deed; cf. above, pp. 880, n. (*k*), 883.

(*s*) *Bates* v. *Kesterton*, 1896, 1 Ch. 159; *Re Lumley*, 1896, 2 Ch. 690; above, p. 883.

(*t*) See above, pp. 195, 196, 239, 467, 535.

(*u*) *Re Wimperis*, 1914, 1 Ch. 502; cf. above, p. 882.

all property as is enjoyed by single women. Thus it was decided that a will made by a woman during coverture and not re-executed by her when she became a widow was not effectual by virtue of the Act to pass property acquired by her after her husband's death (*x*). And the consequences of this ruling were only removed by the Married Women's Property Act, 1893 (*y*), which provided in effect that the will made during coverture of a woman who might die after the passing of that Act (*z*) should take effect as if it had been executed immediately before her death, whether she had or had not any separate property at the time of making it, and need not be re-executed or re-published after her husband's death. So it has been considered that the Act did not repeal the rule that husband and wife are one person in law (*a*), but left it to take effect, where not modified or interfered with; whence it follows that on a gift of land or other property made since the Act to a husband and his wife and others in joint tenancy or tenancy in common, the husband and wife still become entitled to the share of one person only between them, unless a contrary intention appear from the words of the gift (*b*). And it was further held that this Act only enables a married woman to hold and dispose of, as her separate property, estates and interests to which she is entitled for her own use beneficially, and not those to which she is entitled upon any trust (*c*). The consequence of this decision was that, where since the Act (*d*) any hereditaments were limited to a wife upon any trust or had devolved upon her as

hold and dispose of property.

Effect of wives' wills made during coverture.

Amending Act of 1893.

Rule, that husband and wife are one person not repealed.

Property given to a wife on trust.

(*x*) *Re Price*, 28 Ch. D. 709; *Re Cuno*, 43 Ch. D. 12; following the law laid down in *Willock* v. *Noble*, L. R. 7 H. L. 580, with respect to dispositions by will of a married woman's equitable separate estate; and see *Re Bowen*, 1892, 2 Ch. 291.

(*y*) Stat. 56 & 57 Vict. c. 63, s. 3, passed 5th Dec. 1893; *Re James*, 1910, 1 Ch. 157.

(*z*) *Re Wylie*, 1895, 2 Ch. 116, deciding that the Act applies to wills made before its passing.

(*a*) See Wms. Real Prop. 333, 338, 339, 347, 23rd ed.

(*b*) *Re March*, 27 Ch. D. 166; *Re Jupp*, 39 Ch. D. 148, 152; cf. *Re Dixon*, 42 Ch. D. 306; *Re Jeffery*, 1914, 1 Ch. 375. The husband and wife take the share so given to them, as they take any other property given to them since the Act without words of severance, as joint tenants and not, in the case of freeholds or copyholds, by entireties; *Re March*, ubi sup.; *Thornley* v. *Thornley*, 1893, 2 Ch. 229; see Wms. Real Prop. 338, 339, 347, 23rd ed.

(*c*) *Re Harkness and Allsopp's Contract*, 1896, 2 Ch. 358.

(*d*) The disposition of any hereditaments, which were limited to or devolved upon a married woman in trust before the year 1883, is of course governed by the old law existing independently of that Act; see above, p. 890.

executrix or administratrix (*e*), she could not dispose of the same pursuant to the trust by her own act alone, unless the hereditaments were freehold or copyhold and she were a bare trustee thereof (*f*): but her husband took the estate or interest therein bestowed on him by the rules of law or equity apart from the Act, and had to join accordingly in alienating the same by the appropriate method of conveyance. That is to say, if the property were freehold, it had to be assured by deed executed by the husband and wife and duly acknowledged by the wife (*g*); if copyhold, by surrender by the husband and wife, the wife being separately examined, or in the case of an equitable estate in copyholds, by a similar surrender or by deed acknowledged (*h*); and if leasehold, by the husband's assignment with the wife's concurrence (*i*). But it has been decided that, where any hereditaments are vested in a married woman as mortgagee, the mortgage being her separate property, she can convey the same, upon repayment of the mortgage money, as if she were single (*k*). And it has been held that, if she be a trustee of the mortgage, and the hereditaments be freehold or copyhold, she can also convey them, on repayment of the money secured, as a *feme sole;* for on such repayment she becomes a bare trustee thereof (*l*). This doctrine, however, can have no application to leaseholds for years vested in a married woman as mortgagee, where she is a trustee of the mortgage money (*m*). It has been further decided that, where a married woman is one

Married woman mortgagee.

Wife trustee-mortgagee.

(*e*) By the Married Women's Property Act, 1882, stat. 45 & 46 Vict. c. 75, ss. 1 (2), 18, 24, a married woman was enabled to accept any trust or the office of executrix or administratrix without her husband's consent, and was empowered to transfer as if she were a *feme sole* any stock, shares or debentures, to which she was entitled as trustee, executrix or administratrix. But she was not thereby expressly authorised so to dispose of any other trust property. At common law marriage was not a gift to the husband of a term or other chattels held by the wife *en autre droit* as executrix or administratrix; Co. Litt. 351a. But the husband alone could make a valid disposition of such term; *Thrustout* d. *Levick* v. *Coppin,* 2 W. Black. 801; 1 Rop. Husb. & Wife, 187, 188, 2nd ed.; and dispositions of such chattels by the wife alone were void; 2 Wms. Exors. 963, 964, 7th ed.

(*f*) See above, p. 889.

(*g*) Above, p. 880.

(*h*) Above, pp. 879-881.

(*i*) Above, p. 879.

(*k*) *Re Brooke and Fremlin's Contract,* 1898, 1 Ch. 647. This ground of this decision is equally applicable in the case of leaseholds.

(*l*) *Re Howgate and Osborn's Contract,* 1902, 1 Ch. 451; see above, p. 889.

(*m*) See above, pp. 889, 894, n. (*e*).

Re West and Hardy's contract.

of several mortgagees, who became entitled to lands since the Married Women's Property Act, 1882 (*n*), and has made a conveyance thereof as a *feme sole* upon a transfer of the mortgage, a subsequent purchaser is not entitled to raise the objection that she might have been a trustee of the mortgage money, where no notice of any such trust appeared upon the title (*o*). In that case, however, the lands mortgaged were freehold, and the wife alone might make a valid conveyance of them as a bare trustee. If they had been leasehold she could not have done this; and it is submitted that, in the last-mentioned decision, the wrong test was applied. Where several men are jointly entitled to leasehold lands on a trust, which is not disclosed, a purchaser taking a conveyance from them for value and without notice obtains the legal estate and is not affected in equity by the trust (*p*). But if one of such trustees were a married woman, the purchaser would not have got a good title by reason of his having had no notice of the trust; as, if the woman's husband did not assure her share of the lands, the purchaser obtained no legal estate therein. We have seen (*q*) that the Married Women's Property Act, 1882, conferred only a special and not a general capacity of conveyance on a married woman, and did not enable wives to convey their trust estates or interests in any land. It is therefore submitted that at the date of that decision it was incumbent on any one who proposed to make title through any conveyance of land made by a wife alone, to prove either that she was entitled to the estate or interest assured as her separate property, or, if she were a trustee thereof, that she had power to convey the same as a bare trustee.

Amending Act of 1907.

The Married Women's Property Act, 1907, which came into operation on the 1st Jan., 1908 (*r*), was passed in order to remove the inconvenient consequences of the above decision as to wives' trust estates (*s*). The first section of this Act enacts as follows:—

Sub-sect. 1.—A married woman is able, without her husband, to dispose of, or to join in disposing of, real or personal property held by

(*n*) Above, p. 889.
(*o*) *Re West and Hardy's Contract,* 1904, 1 Ch. 145; see above, pp. 225 *sq.*
(*p*) Above, pp. 225 *sq.*, 535.
(*q*) Above, pp. 892, 893.
(*r*) Stat. 7 Edw. VII. c. 18, s. 4.
(*s*) Above, p. 893.

her solely or jointly with any other person as trustee or personal representative in like manner as if she were a *feme sole*.

Sub-sect. 2.—This section operates to render valid and confirm all such dispositions made after the 31st day of December, 1882, whether before or after the commencement of this Act, but, where any title or right has been acquired through or with the concurrence of the husband before the commencement of this Act, that title or right shall prevail over any title or right which would otherwise be rendered valid by this section.

It will be observed that this Act does not make wives' trust property their separate property, nor does it empower them to *hold* their trust property as their separate property or apart from their husbands, so as to exclude their husbands from acquiring the estates or interests therein which are given by the common or general law (*t*). The Act appears only to confer on every married woman a statutory *power* of conveyance of property held by her as trustee (*u*); and it seems that this is a power to dispose alone of any property held by her solely as trustee, and to join with the other trustee or trustees in disposing of any property held by her as trustee jointly with another or others. This raises the following question: If (as appears to be the case) the husband still takes his common law estate or interest in the wife's lands held by her on trust, is the trust property (in cases where the wife is the only trustee *appointed*) held by her *solely* as trustee within the meaning of the above enactment? or is the trust property in effect vested in her jointly with her husband as trustee? Strictly speaking, it does not appear that the trust property is, in these circumstances, held by her jointly with her husband; for, whether the land were freehold, copyhold, or leasehold, they would not be joint tenants. But of freeholds in fee assured to the wife as trustee, the husband and wife would be seised at law in fee in right of the wife (*x*); and of leaseholds so assured the husband

(*t*) See above, pp. 893, 894.

(*u*) It appears that the only way in which full effect can be given to the intention apparent in the Act, is to construe it as investing wives with a statutory *power* to convey the trust property held by them. If it were to be held that the Act merely removes their common law disability to exercise the right of alienation incident to ownership in respect of property held by them as trustees, the Act would be rendered almost nugatory, as married women would then be enabled to convey only the estate or interest vested in them in the trust property and not that vested in their husbands.

(*x*) *Polyblank* v. *Hawkins*, 1 Doug. 329; 1 Wms. Saund. 253, n.; *Jumpsen* v. *Pitchers*, 13 Sim. 327, 331, 332.

alone would be possessed in right of his wife at law (*y*); and in either case the husband would be a trustee of his legal estate or interest (*z*). Is it the fact that in such circumstances the trust property is held by the wife solely as trustee? If not, however, it would appear that, to make an effectual assurance of the trust property, the husband would still have to convey his own legal estate or interest in the land; in which case the amending Act would be rendered almost, though possibly not quite, nugatory (*a*). It is thought that the Courts would certainly struggle to give full effect to the plain intention of the Act, which appears from the words purporting to validate past dispositions. That part of the Act would be completely stultified if it were held that the Act only enables a wife to convey her own interest in the trust property to the exclusion of the estate vested in her husband. The Act authorises the wife to dispose of the property (*b*) held by her as trustee (not merely of her own, and not her husband's, estate or interest in that property) in like manner as if she were a single woman. We have seen (*c*) that the common law enabled married women to hold as well as to *purchase* lands, though her rights were partially transferred to her husband by reason of their unity of person. It is thought therefore that, where any lands or hereditaments have been assured to or have devolved upon a wife as sole appointed trustee, the Act enables her to convey, without her husband's concurrence, the entire estate or interest which was assured to or devolved upon her, as such trustee, in those lands or hereditaments; and that the like construction must be placed on the Act as to all cases where a wife is a joint trustee, and also as to past dispositions by a married woman alone of trust property (*d*).

(*y*) Co. Litt. 46b.

(*z*) Lewin on Trusts, 32, 215, 6th ed.; 33, 275, 12th ed.; above, p. 883.

(*a*) It is conceivable, for instance, that in the case of freeholds, the Act might enable the wife to convey the estate vested in herself without the necessity of acknowledgment, but yet might not empower her to convey the estate vested in her husband; see 1 Key & Elph. Prec. Conv. 805, 9th ed.; 890, 10th ed.

(*b*) It is thought that the word *property* is used in the Act objectively as meaning the lands, hereditaments or chattels subject to the trust. As to the various meanings of this word, see Wms. Real Prop. 3, 4, 23rd ed., approved, *Re Earnshaw Wall,* 1894, 3 Ch. 156, 157.

(*c*) Above, p. 878.

(*d*) The existence of the doubt above referred to is recognised by sect. 75 of the Law of Property Act, 1922, 12 & 13 Geo. V. c. 16 (which is to commence on the 1st January, 1925: s. 191), and it

Separate property how affected by Prescription Act and Statutes of Limitation.

A wife entitled to separate property under the Married Women's Property Act, 1882 (*e*), is held not to be under the disability of coverture as regards such property for the purpose of preventing time from running against her under the Prescription Act (*f*) or the Statutes of Limitation (*g*).

Married women's powers under the Settled Land Acts.

Where a married woman is entitled for her separate use or for her separate property by statute to such an estate or interest in land as would, if she were unmarried, make her a tenant for life or give her the powers of a tenant for life under the Settled Land Act, 1882 (*h*), then she alone, without her husband, has the powers of a tenant for life under that Act (*i*). Where she is so entitled otherwise than as aforesaid, she and her husband together have those powers (*k*). A restraint on anticipation annexed to her interest does not prevent her from exercising any of those powers (*l*). Where land has been assured to a married woman in fee simple, whether at law or in equity, she has not the above-mentioned powers, though she be restrained from anticipation (*m*). But it has been held that, where land is limited to the use of trustees in trust to pay the rents and profits to a married woman during her life, without power of anticipation, and after her death to the use of such persons as she shall by will appoint, and in default to the use of herself in fee, she has the powers in question (*n*).

Married women's contracts.

Under the Married Women's Property Acts, 1882 and 1893 (*o*), married women now enjoy a special and very peculiar capacity of making legal contracts in respect of their separate

is retrospectively declared that a woman trustee married after the 31st December, 1882, can dispose of the trust property without her husband as a *feme sole* and that no interest in the property vests in him.

(*e*) Above, pp. 889 *sq.*

(*f*) Stat. 2 & 3 Will. IV. c. 71, s. 7; *Hulley* v. *Silversprings Bleaching Co.*, 1922, 2 Ch. 268; see Wms. Real Prop. 646, 23rd ed.

(*g*) *Re Lady Hastings*, 35 Ch. D. 94; *Lowe* v. *Fox*, 15 Q. B. D. 667, 12 App. Cas. 206, 210; see Wms. Real Prop. 638 *sq.*, 23rd ed.; Wms. Pers. Prop. 599, 600, 17th ed.

(*h*) Stat. 45 & 46 Vict. c. 38; see s. 58.

(*i*) Sect. 61 (1, 5) as construed in *Bates* v. *Kesterton*, 1896, 1 Ch. 159, 164, and *Re Pocock and Prankerd's Contract*, ib. 302.

(*k*) Sect. 61 (2, 5); see cases cited in previous note.

(*l*) Sect. 61 (6).

(*m*) *Bates* v. *Kesterton*, 1896, 1 Ch. 159.

(*n*) *Re Pocock and Prankerd's Contract*, ib. 302.

(*o*) Stats. 45 & 46 Vict. c. 75, ss. 1 (2), 19; 56 & 57 Vict. c. 63, s. 1.

property to which they are or may become entitled without restraint on anticipation; and any obligation so undertaken by them may be enforced after the determination of the coverture against any property to which they may then be entitled, except only that which belonged to them during coverture as their separate property subject to a restraint on alienation and the income thereof. But apart from this privilege they have no general power to make themselves liable upon any contract (*p*). The rule of the common law was that a married woman was incapable of binding herself by any act or agreement; so that any obligation which she purported to undertake by contract was absolutely void as against her (*q*). But although a wife could incur no liability, she might acquire a right in the nature of a chose in action under a contract made by her during coverture. She could not, however, sue in respect of any such contract during the coverture, except with the concurrence of her husband in joining her name with his own; whilst he could sue thereon in his own name without her, but she might sue alone to get the benefit of such a contract after the coverture had determined (*r*). Apart from the powers conferred by the Married Women's Property Acts, 1882 and 1893, the general incapacity of a married woman to bind herself by a contract is subject to certain exceptions; and it appears that a wife can enter into, or have entered into, a valid contract in the following instances:—

At common law.

Exceptions to wives' incapacity to contract.

1. In the case of the wife of the king (*s*).
2. If her husband be civilly dead, or be undergoing sentence of transportation or penal servitude (*t*).

1. Wife of the king.
2. Husband civilly dead.

(*p*) *Scott* v. *Morley*, 20 Q. B. D. 120; *Re Gardiner*, ib. 249; *Stogdon* v. *Lee*, 1891, 1 Q. B. 661; *Pelton* v. *Harrison*, 1891, 2 Q. B. 422; *Re Hewett*, 1895, 1 Q. B. 328; *Softlaw* v. *Welch*, 1899, 2 Q. B. 419; *Barnett* v. *Howard*, 1900, 2 Q. B. 784; *Brown* v. *Dimbleby*, 1904, 1 K. B. 28.

(*q*) 1 Black. Comm. 444; *Emery* v. *Wase*, 5 Ves. 846; *Jumpsen* v. *Pitchers*, 13 Sim. 327; Sug. V. & P. 206; *Nicholl* v. *Jones*, L. R. 3 Eq. 696; *Cahill* v. *Cahill*, 8 App. Cas. 420; and see *Atwood* v. *Chichester*, 3 Q. B. D. 722; *Expte. Jones*, 12 Ch. D. 484; *Johnson* v. *Clark*, 1908, 1 Ch. 303, 309.

(*r*) *Philliskirk* v. *Pluckwell*, 2 M. & S. 393; *Wills* v. *Nurse*, 1 A. & E. 65; *Dalton* v. *Midland Ry. Co.*, 13 C. B. 474; *De Wahl* v. *Braune*, 1 H. & N. 178; 1 Rop. Husb. & Wife, 213, 2nd ed.; Wms. Pers. Prop. 537, 17th ed.

(*s*) Co. Litt. 133a.

(*t*) 1 Black. Comm. 431; *Carrol* v. *Blencow*, 4 Esp. 27; *Expte. Franks*, 7 Bing. 762.

3. Trading separately in London.

4. Wife of an alien never in England contracting as *feme sole*.

5. During judicial separation.

6. After protection or separation order.

7. To compromise a matrimonial cause, or to live apart from her husband.

3. By the custom of the city of London, in respect of any trade carried on by her within the city separately from her husband (*u*).

4. If she be the wife of an alien, who has never been in England, and she purport to contract as a *feme sole* (*x*).

5. During the continuance of a judicial separation (*y*).

6. After she has obtained a protection order (*z*), or a separation order (*a*).

7. A wife may enter into a binding agreement to compromise proceedings in any matrimonial cause between her husband and herself (*b*); and may in consideration of any such compromise make a valid contract to live apart from her husband. She may also enter into a binding agreement founded upon other valuable consideration than the compromise of such proceedings, to live separate from her husband (*c*). But on the compromise of any matrimonial cause or the execution of an agreement for separation, a wife has no greater capacity to dispose of her *property*, whether by conveyance or contract, than she has at any other time (*d*). So that if she be entitled to freeholds at common law, she cannot dispose of any interest therein, as a part of any such compromise or agreement, except as provided by the Fines and Recoveries Act (*e*). And it appears that, if she be entitled to separate property subject to a restraint on alienation,

(*u*) Bac. Abr. Customs of London (D); 2 Roper on Husband and Wife, 124, 125, 2nd ed.; see *Caudell* v. *Shaw*, 4 T. R. 361; *Beard* v. *Webb*, 2 B. & P. 93.

(*x*) *De Gaillon* v. *L'Aigle*, 1 Bos. & Pul. 357; *Kay* v. *Duchesse de Pienne*, 3 Camp. 123; *Barden* v. *Keverberg*, 2 M. & W. 61; see *Walford* v. *Duchesse de Pienne*, 2 Esp. 554; *Franks* v. *Duchesse de Pienne*, ib. 587; *De Wahl* v. *Braune*, 1 H. & N. 178.

(*y*) Stat. 20 & 21 Vict. c. 85, ss. 25, 26; above, p. 885.

(*z*) Stat. 20 & 21 Vict. c. 85, s. 21; above, p. 886.

(*a*) Stat. 58 & 59 Vict. c. 39, ss. 4, 5; above, p. 886.

(*b*) *Wilson* v. *Wilson*, 1 H. L. C. 538; *Rowley* v. *Rowley*, L. R. 1 Sc. App. 63; *Besant* v. *Wood*, 12 Ch. D. 605, 621; *Rose* v. *Rose*, 8 P. D. 98; *Cahill* v. *Cahill*, 8 App. Cas. 420, 429, 435, 436.

(*c*) *Hunt* v. *Hunt*, 4 De G., F. & J. 221; *Marshall* v. *Marshall*, 5 P. D. 19; *Besant* v. *Wood*, 12 Ch. D. 605; *Clark* v. *Clark*, 10 P. D. 188; *Aldridge* v. *Aldridge*, 13 P. D. 210; *McGregor* v. *McGregor*, 20 Q. B. D. 529; *Re Weston*, 1900, 2 Ch. 164.

(*d*) *Stamper* v. *Barker*, 5 Madd. 157; *Slatter* v. *Slatter*, 1 Y. & C. Ex. 28; *Vansittart* v. *Vansittart*, 4 K. & J. 62; *Cahill* v. *Cahill*, 8 App. Cas. 420; *Harle* v. *Jarman*, 1895, 2 Ch. 419.

(*e*) *Cahill* v. *Cahill*, 8 App. Cas. 420; *Harle* v. *Jarman*, 1895, 2 Ch. 419; see above, p. 880.

she cannot make any disposition thereof, either by way of conveyance or contract, as a term of any such compromise or agreement (*f*).

8. In a policy of insurance effected by a married woman before the year 1883 on her own life or the life of her husband for her separate use by virtue of the Married Women's Property Act, 1870 (*g*).

8. Policy of insurance under Married Women's Property Act, 1870.

Besides these exceptional cases, in which a married woman appears to be enabled to enter into a perfect contract binding herself personally at law, her agreement may, in certain instances, operate as a disposition of property (*h*). Thus where a married woman is entitled to a general power of appointment over any property and contracts by some instrument not complying with all the formalities required by the power to exercise the same in favour of a purchaser, effect will be given to the contract in equity by way of relief against the defective execution of the power and the specific enforcement of the disposition so made against those entitled in default of appointment (*i*) in the same manner as if she had been a single woman or a man (*k*). But in such cases, the Court must be satisfied that the formalities

Wife's contract operating as a disposition of property.

Wife's contract to exercise a power.

(*f*) See cases cited above, p. 883, n. (*s*); *Cahill* v. *Cahill*, 8 App. Cas. 420, 429, 430.

(*g*) Stat. 33 & 34 Vict. c. 93, s. 10, repealed, except as to acts done and rights acquired thereunder, by stat. 45 & 46 Vict. c. 75, s. 22, and replaced by s. 11 of that Act, which, however, only enables a wife to effect such a policy by virtue of the power of contracting given to her by that Act.

(*h*) The essence of a true contract at law is the creation of an obligation binding the contractor personally; and it is foreign to the nature of a contract that it should bind or affect the contractor's property until he has been sued thereon and judgment given against him, or that its validity should depend on the fact of the contractor's being possessed of property at the time either of making or of enforcing the agreement; see Turner, L. J., *Johnson* v. *Gallagher*, 3 De G., F. & J. 494, 519, 520; James, L. J., *Pike* v. *Fitzgibbon*, 17 Ch. D. 454, 461. Where a married woman entitled to property of which she is restrained from anticipating the income, enters into one of these exceptional contracts by which she can bind herself personally at law, execution of a judgment against her in an action on the contract cannot be had against such property so long as it is affected by the restraint; *Hill* v. *Cooper*, 1893, 2 Q. B. 85; see above, pp. 883, 884; *Hyde* v. *Hyde*, 13 P. D. 166; *Hood Barrs* v. *Cathcart*, 1894, 2 Q. B. 559, 567 *sq.*; *Hood Barrs* v. *Heriot*, 1896, A. C. 174; *Whiteley* v. *Edwards*, 1896, 2 Q. B. 48; *Bolitho & Co., Ltd.* v. *Gidley*, 1905, A. C. 98.

(*i*) *Dowell* v. *Dew*, 1 Y. & C. C. C. 345; *Thackwell* v. *Gardiner*, 5 De G. & S. 58, 65; Sug. Pow. 536, 537, 8th ed.; 2 Dart, V. & P. 1000, 1001, 5th ed.; 1120, 1121, 6th ed.

(*k*) Above, pp. 278, 279, 511, 512.

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which have not been observed are no more than matters of form; and that the donee of the power has not, by their non-observance, been deprived of any of the protection, which a due exercise of the power would have afforded her. Otherwise the Court will not relieve against the defective execution of the power (*l*).

Wife's contract made with the formalities required by the Fines and Recoveries Act.

Again, where a married woman is entitled to any interest in land, of which she can only dispose by deed acknowledged with her husband's concurrence under the Fines and Recoveries Act (*m*), and by such a deed she enters into a contract which would, if she were *sui juris*, bind her interest in equity—for example, a contract to sell, mortgage or settle the same—then such contract will operate in equity as an effective disposition of her interest (*n*).

Wives' general engagements in equity.

Under the rules of equity, a married woman had power to bind any separate estate, to which she was entitled *without* restraint on anticipation, by her general pecuniary engagements entered into with respect thereto (*o*); and such engagements might be enforced, by suit against her in a Court of Equity, out of any such separate estate, to which she was entitled at the time of entering into the engagement, but not against any separate estate, to which she might thereafter have become entitled, or which she was restrained from anticipating (*p*). But such engagements did not create any lien on the separate estate, out of which they might be enforced, so as to prevent the wife from alienating the same (*q*). And they did not involve her in any legal liability, and so could not be enforced after the determination of the coverture either against her personally or so as to affect any property to which she might then be entitled, except that which was already bound by the engagements (*r*).

Specific performance of contract disposing of a wife's separate estate.

If a wife entitled to any separate estate without restraint on anticipation made a particular disposition thereof by way of contract such as would have entitled the other party to sue for specific performance, in case she had been a *feme sole*

(*l*) *Thackwell* v. *Gardiner*, 5 De G. & S. 58, 65; see above, pp. 278, 279.
(*m*) Above, pp. 880, 881, 889.
(*n*) *Crofts* v. *Middleton*, 8 De G., M. & G. 192; Sug. V. & P. 207; 2 Dart, V. & P. 999, 1000, 5th ed.; 1119, 1120, 6th ed.
(*o*) Above, p. 883.
(*p*) *Pike* v. *Fitzgibbon*, 17 Ch. D. 454.
(*q*) *Pike* v. *Fitzgibbon*, 17 Ch. D. 460, 461.
(*r*) *S. C.*

—as if she contracted to sell or mortgage any land forming part of such separate estate—then the contract would be specifically enforced in equity against the property so disposed of and all persons succeeding to her estate therein (*s*); and also against the wife herself after the determination of the coverture (*t*). But no decree would be made against the married woman personally for specific performance of the contract, so long as she remained under the same coverture as existed at the time of entering into the agreement (*u*). And if a married woman, having separate estate free from any restraint, contracted to buy land, the contract was enforceable in equity as a general engagement binding her separate estate, and not otherwise; and a decree for specific performance would not be made against her personally (*x*). But a married woman, who had sold land forming part of her separate estate or bought land with her separate estate, might herself enforce the contract specifically; and the fact, that the contract was enforceable as above mentioned against her separate property (though not against her personally), was sufficient to prevent the other party from raising the defence of want of mutuality (*y*).

Wife purchasing land with her separate estate.

Married woman contracting in respect of her separate estate might enforce specific performance.

With regard to wives' contracts under the Married Women's Property Acts, 1882 and 1893 (*z*):—It is enacted in the Act of 1882 (*a*) that a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her

Wives' contracts under the Married Women's Property Acts.

(*s*) Except, of course, purchasers of the legal estate therein for value and without notice; above, p. 535.

(*t*) *Grigby* v. *Cox*, 1 Ves. sen. 517; *Stead* v. *Nelson*, 2 Beav. 245; *Wainwright* v. *Hardisty*, ib. 363; Sug. V. & P. 206.

(*u*) *Aylett* v. *Ashton*, 1 My. & Cr. 105, 111; *Warne* v. *Routledge*, L. R. 18 Eq. 497, 500.

(*x*) *Francis* v. *Wigzell*, 1 Madd. 258; *Picard* v. *Hine*, L. R. 5 Ch. 274; see also *Gaston* v. *Frankum*, 2 De G. & S. 561, reversed on other grounds, 16 Jur. 507.

(*y*) *Francis* v. *Wigzell*, 1 Madd. 258, 261-264; *Dowling* v. *Maguire*, Ll. & G. t. Plunk. 1, 9, 15, 19, 20; 2 Dart, V. & P. 1045, 5th ed.; 1162, 6th ed.

(*z*) Above, p. 892.

(*a*) Stat. 45 & 46 Vict. c. 75, s. 1 (2).

in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise. According to the judicial construction of this enactment, a married woman is not thereby enabled to render herself liable on any contract, otherwise than in respect and to the extent of her separate property (*b*). Consequently, although a breach of a wife's contract to pay money or a judgment against her for breach of her contract made under the Act will result in a debt due from her, which may be the subject of a set-off (*c*), will be an ante-nuptial debt in case she marry again (*d*), and will, if a judgment debt, entitle the judgment creditor to issue execution by way of garnishee order against her (*e*), yet she does not incur thereby the same personal liability to pay as is incumbent on an indebted man or single woman. She cannot therefore be imprisoned under the Debtors Act, 1869 (*f*), for failure to satisfy any such judgment (*g*). Nor can any liability to pay money incumbent on her by virtue of any such contract be enforced by the attachment of her person, in cases where that process would be available against her if she were a single woman (*h*). Nor is she liable to be made bankrupt by reason of any such debt or judgment (*i*); except by special statutory provision (*k*), in the case of her carrying on a trade or business, whether separately from her husband or not (*l*). Under such a judgment, it has been held, execution shall only issue against the wife's separate property; and as the Act is not to interfere with any restriction against anticipation (*m*), it has been held, by analogy to the previous law respecting a wife's general engagements (*n*), that the separate property which can be taken to satisfy a wife's liability

Nature of their liability thereunder.

Separate property subject to a

(*b*) *Scott* v. *Morley*, 20 Q. B. D. 120; *Re Turnbull*, 1900, 1 Ch. 180, 184.
(*c*) *Pelton* v. *Harrison*, 1892, 1 Q. B. 118.
(*d*) *Jay* v. *Robinson*, 25 Q. B. D. 467.
(*e*) *Holtby* v. *Hodgson*, 24 Q. B. D. 103; *Lady Aylesford* v. *Great Western Ry. Co.*, 1892, 2 Q. B. 626.
(*f*) Stat. 32 & 33 Vict. c. 62, s. 5; Wms. Pers. Prop. 229, 17th ed.
(*g*) *Scott* v. *Morley*, 20 Q. B. D. 120.
(*h*) *Re Turnbull*, 1900, 1 Ch. 180.
(*i*) *Re Gardiner*, 20 Q. B. D. 249; not even after the coverture has ceased; *Re Hewett*, 1895, 1 Q. B. 328.
(*k*) Stat. 4 & 5 Geo. V. c. 59, s. 125, replacing 45 & 46 Vict. c. 75, s. 1 (5); Wms. Pers. Prop. xcix. 267, 17th ed.
(*l*) See *Re Handford*, 1899, 1 Q. B. 566.
(*m*) Stat. 45 & 46 Vict. c. 75, s. 19; above, p. 890.
(*n*) Above, p. 902.

upon her contract is limited to that to which she is entitled without restraint on anticipation (*o*). But by the Act of 1882, where a wife made a valid contract thereunder, any separate property to which she might afterwards during the coverture become entitled, without restraint on anticipation, was made liable to satisfy her liabilities so incurred (*p*). And under the same Act it was decided that, where judgment was obtained against a wife (whilst covert) in an action on her contract made during the coverture, arrears then accrued due but unpaid of income, which she was restrained from anticipating, might be taken to satisfy the judgment (*q*), though not arrears of such income accruing due after the date of the judgment (*r*). It was further held, that a wife could not be made liable under the Act of 1882 in respect of any contract, unless she had some separate property to which she was entitled without restraint on anticipation, at the time when she made the contract (*s*); and that a wife's contract was not enforceable after the coverture had ended, against any property which had not been her separate property during the coverture (*t*).

restraint on anticipation, not liable.

But in these last respects the law has been altered by the Married Women's Property Act, 1893 (*u*), enacting that every contract thereafter entered into (*x*) by a married woman, otherwise than as agent (*y*), shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; and such contract shall bind all separate property which

Married Women's Property Act, 1893.

(*o*) *Scott* v. *Morley*, ubi sup.; *Pelton* v. *Harrison*, 1891, 2 Q. B. 422.

(*p*) Stat. 45 & 46 Vict. c. 75, s. 1 (4), repealed and replaced by stat. 56 & 57 Vict. c. 63, ss. 1, 4; see note (*u*), below.

(*q*) *Hood Barrs* v. *Heriot*, 1896, A. C. 174.

(*r*) *Whiteley* v. *Edwards*, 1896, 2 Q. B. 48; *Bolitho & Co., Ltd.* v. *Gidley*, 1905, A. C. 98.

(*s*) *Palliser* v. *Gurney*, 19 Q. B. D. 519; *Leak* v. *Driffield*, 24 Q. B. D. 98; *Pelton* v. *Harrison*, 1891, 2 Q. B. 422; *Re Fieldwick*, 1909, 1 Ch. 1.

(*t*) *Stogdon* v. *Lee*, 1891, 1 Q. B. 661; *Pelton* v. *Harrison*, 1891, 2 Q. B. 422; *Softlaw* v. *Welch*, 1899, 2 Q. B. 419.

(*u*) Stat. 56 & 57 Vict. c. 63, s. 1, passed 5th Dec. 1893, replacing with amendments stat. 45 & 46 Vict. c. 75, s. 1, sub-ss. 3, 4, the latter of which provided that a wife's contract should bind all separate property which she might acquire after the contract.

(*x*) See *Re Wheeler*, 1904, 2 Ch. 66.

(*y*) See *Paquin, Ltd.* v. *Beauclerk*, 1906, A. C. 148.

she may at that time or thereafter be possessed of or entitled to, and shall also be enforceable by process of law against all property which she may thereafter, while discovert, be possessed of or entitled to; provided that these amending enactments shall not render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating. It has been held since this Act that, where a married woman has made a contract thereunder and was entitled to some separate property subject to a restraint on anticipation, and judgment in an action on the contract has been obtained against her after the determination of the coverture, neither the capital of that property nor any arrears of the income thereof accrued due at the date of the judgment can be taken or attached in execution of the judgment (*z*). And the effect of the construction so put upon this Act is that, where judgment is obtained against a wife (whilst covert) in an action on her contract made during the coverture and since the Act, no arrears accrued due or savings made after the date of the contract of any income, which she is restrained from anticipating, can be taken to satisfy the judgment (*a*). The Act of 1893 also gives jurisdiction to the Court, before which any action or proceeding instituted by a woman or by a next friend on her behalf is pending, to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and to enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just (*b*).

Effect of that Act as to property subject to a restraint on anticipation.

Costs against married women in proceedings instituted by them.

Specific performance by or against a married woman.

A married woman contracting, under the powers given to her by the Married Women's Property Acts, 1882 and 1893 (*c*), either to sell land, which is her separate property without re-

(*z*) *Barnett* v. *Howard*, 1900, 2 Q. B. 784; *Brown* v. *Dimbleby*, 1904, 1 K. B. 28; see *Sprange* v. *Lee*, 1908, 1 Ch. 424, 432.

(*a*) As regards contracts thereafter made, the Act of 1893 alters the law laid down in *Hood Barrs* v. *Heriot*, above, p. 905, n. (*q*); so held by the Court of Appeal in *Wood* v. *Lewis*, 1914, 3 K. B. 73, following *Barnett* v. *Howard*, above.

(*b*) Stat. 56 & 57 Vict. c. 63, s. 2, amending the law laid down in *Re Glanvill*, 31 Ch. D. 532; *Cox* v. *Bennett*, 1891, 1 Ch. 617; but not retrospective; *Re Lumley*, 1894, 3 Ch. 135. A counterclaim is such a proceeding; *Hood Barrs* v. *Cathcart*, 1895, 1 Q. B. 873. See *Gordon* v. *Gordon*, 1904, P. 163; *Pawley* v. *Pawley*, 1905, 1 Ch. 593; *Dresel* v. *Ellis*, 1905, 1 K. B. 574. An intervener is an opposite party for this purpose; *Studley* v. *Studley*, 1913, P. 119.

(*c*) Above, pp. 903 *sq*.

straint on anticipation, or to buy land, may herself enforce the specific performance of the contract by the other party thereto (*d*); and she may be sued and judgment may be given against her personally for specific performance of such a contract, subject, however, to the limitations imposed by the judicial construction of these Acts (*e*) upon her liability under any such judgment. It remains to be decided to what extent, if at all, a married woman is liable to process of contempt in case of her disobedience to any order (such as an order for conveyance of the property sold (*f*)) made against her in an action to enforce the specific performance of such a contract. But a married woman may be attached or committed for disobedience to an order of the Court directing her to do some act, which does not involve the satisfaction of a pecuniary liability assumed by her under her contract made by virtue of the Married Women's Property Acts (*g*). And an order directing a married woman to do any such act within a limited time may be enforced by writ of sequestration (*h*) against all her separate property to which she is then entitled without restraint on anticipation (*i*).

Wife trustee for sale.

Before the Married Women's Property Act, 1882 (*k*), a married woman, who was a trustee for sale of land, could not enter into a contract for the sale thereof, which would effectually bind her (*l*). A decree for the specific performance of the contract could not therefore be obtained either against her (*l*), or (for want of mutuality) in her favour (*m*). But it seems

(*d*) Above, pp. 903, 904.
(*e*) Above, pp. 903-906.
(*f*) See Seton on Judgments, 2215, 2217, 7th ed.
(*g*) *Re Turnbull*, 1900, 1 Ch. 180; R. S. C. 1883, Order XLII. rule 7; see above, p. 904.
(*h*) R. S. C. 1883, Order XLIII. rule 6.
(*i*) See above, pp. 883, 892; *Hyde* v. *Hyde*, 13 P. D. 166. It appears that, if the order were to do some act agreed to be done by the wife under her contract made by virtue of the Married Women's Property Act, 1893, arrears accrued due or savings made after the date of the contract of income, which she was restrained from anticipating, could not be attached under a sequestration for default of compliance with the order; see above, p. 905. As to a sequestration issuing for default of compliance by a wife with an order for payment of costs made against her in any proceeding instituted by her, see above, pp. 904-906, and n. (*r*); R. S. C. 1883, Order XLIII. rule 7; *Hulbert* v. *Cathcart*, 1896, A. C. 470.
(*k*) Above, pp. 898, 903.
(*l*) *Avery* v. *Griffin*, L. R. 6 Eq. 606; above, pp. 902, 903. She could dispose of her estate in the land with the formalities required under the Fines and Recoveries Act, 1833; above, pp. 880-882, 893-897.
(*m*) Fry, Sp. Perf. § 461, 3rd ed.

that she may now enter into such a contract, and that she herself and her separate property would be liable, to the extent permitted by the Married Women's Property Acts, 1882 and 1893 (*n*), for the due performance of the agreement; notwithstanding that the trust estate sold is not her separate property (*o*).

Contract induced by a married woman's misrepresentation.

Where a contract made with a married woman has been induced by her misrepresentation, whether innocent or fraudulent, the other party has the same rights in respect of the rescission or of avoiding the specific performance of the contract as if she were single (*p*). But if the false representation were made fraudulently, she is not equally liable to an action of deceit as if she were unmarried. A false representation fraudulently made by a married woman, like any other tort committed by her, was in general a good cause of action against her at common law, and still remains so (*q*). But at common law she could only be sued therefor jointly with her husband, so long as the coverture lasted (*r*); though after its dissolution by death or divorce, the husband's liability to be so sued ended (*s*), whilst the wife surviving remained liable to be sued alone (*t*). At the present time, the wife may be sued for any wrong done by her during the coverture either alone under the Married Women's Property Act, 1882 (*u*), or together with her husband according to the old law (*x*). It was held at common law, however, in consequence of a married woman's incapacity to bind herself by contract (*y*), that if by her fraudu-

Wife's liability for her fraud.

(*n*) Above, pp. 903 *sq.*

(*o*) See Neville, J., *Sprange* v. *Lee,* 1908, 1 Ch. 424, 432; above, pp. 893, 896.

(*p*) Above, pp. 790, 795, 809.

(*q*) *Liverpool Adelphi Loan Association* v. *Fairhurst,* 9 Ex. 422, 429; *Wright* v. *Leonard,* 11 C. B. N. S. 258; *Earle* v. *Kingscote,* 1900, 1 Ch. 203, 2 Ch. 585; *McNeall* v. *Hawes,* 1923, W. N. 14.

(*r*) Bac. Abr. Baron and Feme (K, L); 1 Black. Comm. 443; *Head* v. *Briscoe,* 5 C. & P. 484.

(*s*) *Higgins' case,* Noy, 18; *Capel* v. *Powell,* 17 C. B. N. S. 743. But if the wife died or the marriage were dissolved after judgment in such an action, the husband remained liable on the judgment, which was given against them jointly; see Wms. Pers. Prop. 534, 544, 545, 17th ed.

(*t*) *Capel* v. *Powell,* 17 C. B. N. S. 743.

(*u*) Above, p. 903.

(*x*) *Seroka* v. *Kattenburg,* 17 Q. B. D. 177; *Earle* v. *Kingscote,* 1900, 2 Ch. 585; *Beaumont* v. *Kaye,* 1904, 1 K. B. 292; but see Moulton, L. J., *Cuenod* v. *Leslie,* 1909, 1 K. B. 880, taking a view similar to that urged by the author in L. Q. R. xvi. 191.

(*y*) Above, p. 899.

lent misrepresentation (as by stating that she was unmarried) she induced any one to enter into a contract with her, she could not be made liable in any proceedings in tort to recoup the other party his damages caused by her failure to carry out her agreement (*z*). As the Married Women's Property Acts, 1882 and 1893 (*a*), have only given to married women a limited and special capacity to contract not involving their complete personal liability (*b*), and have not increased a wife's liability for her torts otherwise than by permitting an action thereon to be brought against her without her husband, this exception to a wife's liability for her fraud still remains in force, and where her fraud has been the means of inducing another to contract with her, no action in tort therefor will lie either against her and her husband or against herself alone (*c*). In other words, a married woman cannot by means of her own fraud enlarge the limited capacity of contracting bestowed on her by the Married Women's Property Acts (*d*), so as to assume a personal liability for her default in making good her agreement. This exception is, however, confined to cases where the wife's fraud has been the means of inducing the other party to contract with her; and where a married woman, who had already entered into a contract with another, subsequently made a false representation to him as to a fact, which was a condition precedent to his performing his part of the agreement, she and her husband were held to be liable in an action of deceit brought against them for the wrong so committed (*e*). But the meaning of *contract* in this connexion has been extended to the warranty of authority implied by law in the case of the wife's assuming to act as her husband's agent; and it has been held that she is not liable in tort, either alone or jointly with her husband, for *fraudulently* assuming so to act (*f*).

Estoppel by conduct of a married woman.

A married woman might, notwithstanding her coverture, be subject in equity to an estoppel by reason of her conduct so as to deprive herself of her rights in any land or property. Thus

(*z*) *Liverpool Adelphi Loan Association* v. *Fairhurst*, 9 Ex. 422. Cf. above, p. 849, and n. (*r*).
(*a*) Above, pp. 898, 903.
(*b*) Above, pp. 903-906.
(*c*) See *Earle* v. *Kingscote*, 1900, 1 Ch. 203, 208, 2 Ch. 585, 588 *sq.*
(*d*) Above, pp. 898, 903 *sq.*
(*e*) *Earle* v. *Kingscote*, ubi sup.
(*f*) *Edwards* v. *Porter*, 1923, W. N. 9, affd. 67 Sol. J. 482; *McNeall* v. *Hawes*, 1923, W. N. 14, reversed, 67 Sol. J. 483.

if by her misrepresentation, whether in the form of the positive assertion of an untruth or of active concealment of her interest, she induced another person to take for valuable consideration a conveyance of any property inconsistent with her own rights therein, the Courts of Equity would not permit her to take advantage of her own deceitful conduct and would accordingly restrain her from asserting her rights in derogation of the conveyance and compel her to give effect thereto (*g*). This rule was applied in equity whether the wife were entitled to the property affected at common law or in equity, and if in equity, whether for her separate use or not (*g*): but she could not so deprive herself of any interest, as to which she was restrained from anticipation (*h*). Where a wife is entitled to any separate property under the Married Women's Property Act, 1882 (*i*), she may of course be deprived of her rights therein by estoppel in the same way: but not so as to interfere with the effect of any restraint on anticipation attached thereto (*k*).

Election by a married woman.

It was also held in equity that a married woman might be put to her election, under the equitable doctrine in that behalf, whether she would claim under or against some instrument conferring a benefit on her and at the same time purporting to dispose of her property; and an inquiry would be directed, which alternative it would be most beneficial for her to select, and a choice made by the Court on her behalf accordingly (*l*). Her election so exercised would in equity bind her estate or interest in any land (*m*) affected thereby, whether she were

(*g*) *Savage* v. *Foster*, 9 Mod. 35; *Nicholl* v. *Jones*, L. R. 3 Eq. 696, 709; *Sharpe* v. *Foy*, L. R. 4 Ch. 35; *Re Lush's Trusts*, ib. 591. Cf. above, p. 849. In *Nicholl* v. *Jones*, ubi sup., it was held that, as the other party was aware of the wife's interest and of her incapacity, he was not misled by her conduct; see above, p. 576.

(*h*) *Jackson* v. *Hobhouse*, 2 Mer. 483, 488; *Stanley* v. *Stanley*, 7 Ch. D. 589; *Bateman* v. *Faber*, 1898, 1 Ch. 144.

(*i*) Above, pp. 889 *sq*.

(*k*) Above, p. 892.

(*l*) *Cooper* v. *Cooper*, L. R. 7 H. L. 53, 79. But it appears that she might signify her election by her conduct; see *Greenhill* v. *North British and Mercantile Insurance Co.*, 1893, 3 Ch. 474, 480.

(*m*) A married woman might also so elect as to affect her interest in any personalty; *Griggs* v. *Gibson*, L. R. 1 Eq. 685; except, it seems, her reversionary chose in action not alienable under Malins' Act, stat. 20 & 21 Vict. c. 57; *Whittle* v. *Henning*, 2 Ph. 731; *Williams* v. *Mayne*, I. R. 1 Eq. 519; see, however, *Greenhill* v. *North British and Mercantile Insurance Co.*, 1893, 3 Ch. 474, commented upon in *Harle* v. *Jarman*, 1895, 2 Ch. 419.

entitled thereto at common law or in equity, and although it were not evidenced with the formalities prescribed by the Fines and Recoveries Act or otherwise necessary for her alienation of the land (*n*). *A fortiori*, she might elect in the same manner as if she were a *feme sole* so as to bind any property settled for her separate use without restraint on anticipation (*o*), and may do so with regard to any separate property, to which she is entitled without such restraint under the Married Women's Property Act, 1882 (*p*). But if her own property dealt with by the instrument be subject to a restraint on alienation, she cannot by her election or any other act *in pais* deprive herself of the benefit thereof (*q*). And it appears that in this case all that can be required of her, as a condition of her taking the benefit, is to confirm the instrument conferring it so far as she can; and that, as she has no alienable interest in the property of her own thereby disposed of, she is not affected by the doctrine of election and may take the benefit given to her without compensating those to whom the instrument purported to convey her own property (*r*). Where the instrument, which confers a benefit on her, gives it to her with a restraint on anticipation, it is held that this shows the settlor's intention to be that she shall not be put to her election; and in such case she is entitled to retain the benefit conferred without making any conveyance of her own property to give effect to the disposition thereof, which the instrument purported to make (*s*).

Married woman affirming

It has been held of late years that, where a female infant has made whilst unmarried a voidable conveyance of her pro-

(*n*) *Ardesoife* v. *Bennet*, 2 Dick, 463; *Barrow* v. *Barrow*, 4 K. & J. 409; *Willoughby* v. *Middleton*, 2 J. & H. 344; *Griggs* v. *Gibson*, L. R. 1 Eq. 685, 691.

(*o*) See *Re Davidson*, 11 Ch. D. 341, 348.

(*p*) Above, pp. 889 *sq.*

(*q*) *Robinson* v. *Wheelwright*, 21 Beav. 214, 6 De G., M. & G. 535; *Bateman* v. *Faber*, 1898, 1 Ch. 144.

(*r*) This appears to follow from the principles applied in *Re Chesham*, 31 Ch. D. 466. It may, perhaps, be contended that she would at least be bound to apply for an order of the Court removing the restraint (see above, p. 884). But it is thought that, as the making of this order is no mere formality, but lies in the discretion of the Court, the possibility of obtaining it does not give her an alienable interest, and so cause her to be put to her election.

(*s*) *Re Vardon's Trusts*, 31 Ch. D. 275. But a spinster or a widow in the like case is put to her election; *Re Tongue*, 1915, 1 Ch. 390, 392, affd. on a question of fact, 1915, 2 Ch. 283; *Re Hargrove*, 1915, 1 Ch. 397; not following *Haynes* v. *Foster*, 1901, 1 Ch. 361.

or avoiding her voidable conveyance or contract made whilst single and in infancy.

perty, or a voidable contract operating in equity as a disposition of her property, and has afterwards married during her infancy, her coverture is no bar to her exercising her choice of avoiding or affirming the conveyance or contract; which is therefore fully binding, if not repudiated by her within a reasonable time after she has attained full age (*t*). This ruling is unquestionably correct where the property affected would in case of the wife's repudiation of her voidable conveyance or contract belong to her for her separate use or as her separate property under the Married Women's Property Act, 1882; for she can dispose of all such property as if she were a *feme sole* (*u*). But as applied to property, to which on repudiation the wife would be entitled under the old law, and especially where the property disposed of in infancy was her reversionary chose in action (*x*), the doctrine so laid down appears to be at variance with the law of married women's incapacity, as previously understood (*y*). The rule in question has no application where the infant on her marriage becomes subject to some foreign law, by which she is deprived during her coverture of the capacity of giving her full

(*t*) *Wilder* v. *Pigott,* 22 Ch. D. 263; *Burnaby* v. *Equitable Reversionary Interest Socy.*, 28 Ch. D. 416; *Re Hodson,* 1894, 2 Ch. 421; *Viditz* v. *O'Hagan,* 1900, 2 Ch. 87, 96-98, 100; above, pp. 847, 857.

(*u*) *Smith* v. *Lucas,* 18 Ch. D. 531, 544; above, pp. 883, 890, 891.

(*x*) See cases cited in the last note but one.

(*y*) See *Whittle* v. *Henning,* 2 Ph. 731; *Ellison* v. *Elwin,* 13 Sim. 309; *Le Vasseur* v. *Scratton,* 14 Sim. 116; *Williams* v. *Mayne,* I. R. 1 Eq. 519; none of which were cited in the cases mentioned in note (*t*). And note that it was considered that a wife's capacity to agree to a conveyance made *to* her was suspended during her coverture; above, p. 878, n. (*t*). It is submitted that in the cases cited in note (*t*), the judges confused the doctrine of election, to take under or against an instrument, which is a matter depending purely on the rules of equity and the equitable principles of estoppel by conduct (above, pp. 909-911), with the election or choice of affirming or disaffirming a voidable conveyance or contract. This, it is thought, is properly a matter depending on the party's capacity at common law; and by the common law, a woman's capacity in this respect appears to have been suspended during her coverture. It is not denied that, where by the instrument effecting the voidable conveyance or contract, the infant has derived benefits from other sources, she may be put to her election whether she will claim under or against the instrument: and it appears that *Wilder* v. *Pigott,* 22 Ch. D. 263, 267, was really a case of this kind of election; though even so regarded it is in conflict with *Williams* v. *Mayne,* I. R. 1 Eq. 519. But in *Re Hodson,* 1894, 2 Ch. 421, it does not appear that there was any ground to put the wife to her election to take under or against her settlement, which seems to have comprised her own property alone; and it is submitted that Chitty, J., certainly confused this sort of election with the legal capacity of affirming a voidable conveyance.

consent to the conveyance or contract so made before her marriage (*z*).

Title to English land may be affected by the marriage of the owner, while domiciled abroad. *Re De Nicols.*

In connexion with the law of husband and wife, it may be mentioned that, according to the decision in *Re De Nicols* (*a*), the title to land situate in England, but belonging to a man or a woman, who is or was domiciled elsewhere and married while domiciled abroad, may be affected by the law of the country, in which the marriage took place. In that case a Frenchman domiciled in France married there a Frenchwoman without any express contract as to their property, so that by French law they came under the rule of community of goods. The pair then came to England and acquired an English domicile, and the husband became the owner of freehold and leasehold land in England. It was held that, on the husband's death, the wife was entitled, according to the law of community of goods under which she married, to one half of this land (*b*), as well as of his moveable goods (*c*), and that these rights must prevail over his testamentary dispositions of his property. The grounds of this decision were that the marriage under the French rule of community of goods constituted an implied contract between the parties as to their proprietary rights, which was equivalent to an express contract to the same effect, and that this contract was provable by parol evidence, notwithstanding the Statute of Frauds (*d*), on the same principle as has been applied in the case of parol agreements of partnership affecting land (*e*). But of course the wife did not in that case acquire any legal estate or interest in her husband's lands or goods in England. Her rights were contractual only at law, and her interest in the property was merely equitable. So that, although she was enabled to enforce her rights specifically against her husband's devisees

(*z*) *Viditz* v. *O'Hagan,* 1900, 2 Ch. 87; see above, p. 847, and n. (*m*). It may be remarked that the principle, on which this decision is based, may be invoked against the doctrine laid down in the other cases cited in note (*t*), p. 912, above; as according to the elder authorities it was exactly this capacity which was denied to married women by the common law.

(*a*) 1900, 2 Ch. 410.

(*b*) Ibid.

(*c*) *De Nicols* v. *Curlier,* 1900, A. C. 21.

(*d*) Stat. 29 Car. II. c. 3, ss. 4, 7.

(*e*) *Forster* v. *Hale,* 3 Ves. 696, 5 Ves. 308; *Dale* v. *Hamilton,* 5 Hare, 369; *Gray* v. *Smith,* 43 Ch. D. 208, 211.

of the land, she would have had no equity or other claim against a purchaser from them taking the legal estate in the lands for value without notice of the marriage contract (*f*).

§ 7.—*Corporations.*

Corporations.

Corporations, as conceived by the common law, have as full capacity to *purchase,* hold and dispose of lands as any natural person, who is free from disability (*g*). But under the Mortmain and Charitable Uses Act, 1888 (*h*), which in this respect repealed and replaced the Mortmain Act of Edward I. and other statutes (*i*), the assurance (*k*) of land (*l*) to or for the

(*f*) Above, pp. 535 *sq.* The correctness of the decision in *Re De Nicols* is questioned in Dicey's Conflict of Laws, 554, 3rd ed.

(*g*) *Case of Sutton's Hospital,* 10 Rep. 23, 29b-31a; 1 Black. Comm. 475; *Colchester* v. *Lowten,* 1 V. & B. 226, 246; Blackburn, J., *Riche* v. *Ashbury, &c. Co.,* L. R. 9 Ex. 224, 263; *British South Africa Co.* v. *De Beers, &c., Ltd.,* 1910, 1 Ch. 354, 374-376; affd. 1910, 2 Ch. 502, reversed on the facts, 1912, A. C. 52; *Bonanza Creek Gold Mining Co., Ld.* v. *R.,* 1916, A. C. 566, 578, 582-585; *Jenkin* v. *Pharmaceutical Society,* 1921, 1 Ch. 392, 398; and see Co. Litt. 2a, 2b, 13b, 94b, 44a, 250a, 300b, 301a, 325b. It should be noted, however, that, before the Wills Act, 1837, a devise of land to or in trust for a corporation was invalid, unless the corporation were empowered by statute to take land by devise; for the old statutes authorising the alienation of fee simple estates by will did not permit of the devise of land in favour of a corporation; stats. 32 Hen. VIII. c. 1; 34 & 35 Hen. VIII. c. 5, s. 4; 1 Jarm. Wills, 84-86, 6th ed.

(*h*) Stat. 51 & 52 Vict. c. 42, s. 1.

(*i*) Stats. 7 Edw. I. st. 2; 13 Edw. I. c. 32; 18 Edw. III. st. 3, c. 3; 15 Ric. II. c. 5.

(*k*) As to the meaning of *assurance* in this Act, see above, pp. 426, n. (*z*), 435.

(*l*) Here including tenements and hereditaments, corporeal or incorporeal, of any tenure; see stat. 54 & 55 Vict. c. 73, s. 3, replacing 51 & 52 Vict. c. 42, s. 10 (iii); above, p. 429. It appears that the old Statutes of Mortmain did not prevent a corporation from taking a lease of lands for a term of years (unless so limited as to be in effect perpetual) or from taking any interest in lands, which would not be perpetual; see Vin. Abr. Mortmain (B. 20-22); *Jesus Coll.* v. *Gibbs,* 1 Y. & C. 145, 147, 148; *Vigers* v. *Dean of St. Paul's,* 18 L. J. Q. B. 97, 103; Tudor, Charitable Trusts, 429, 4th ed. These authorities have been judicially considered to apply to the construction of the Mortmain Act of 1888, so as to exempt a lease for fourteen years from its provisions; *Tours Corpn.* v. *Rowe,* 1901, 2 K. B. 870, 875; 1902, 2 K. B. 709, 714; in which case, however, the difference in the language of this Act from that of the old statutes was not adverted to; see 60 Sol. J. 86 (by the author). As the Mortmain Act of 1888 is mainly a Consolidation Act, cases decided on the old statutes are authorities upon its construction, unless the variation in its language from that of the old statutes is sufficient to import a change in the law enacted by them; see above, p. 433, and n. (*l*).

benefit of a corporation in mortmain, otherwise than under the authority of a royal licence or a statute, is a cause of forfeiture to the lord of the fee; or if he fail to enter within a year, to his superior lord (*m*); and in default of entry thereon by any mesne lord, to the Crown (*n*). It follows that a corporation, although it may *purchase* lands, cannot retain them without being especially enabled to hold lands either by a licence from the Crown (*o*), or by an Act of Parliament (*p*). This applies to land assured to a corporation by way of mortgage as well as for its own use absolutely (*q*). And lands vested in trustees on trust for a corporation, or otherwise assured to a corporation in equity, without the authority of such licence or statute, are equally liable to forfeiture with those in which the corporation has taken a conveyance of the legal estate (*r*). The instances in which corporations are empowered by statute to hold land without a licence in mortmain are too numerous to be particularly mentioned in a work like the present. Some particular corporations are authorised by Act of Parliament to hold lands without any restriction; others are allowed to hold lands not exceeding a certain annual value. And in other cases the alienation of land, or of a limited quantity of land, into mortmain is permitted for particular purposes, which are chari-

Mortgage of land to a corporation.

Assurance of land in trust for a corporation.

(*m*) Any superior lord must enter within six months after his inferior's right of entry has expired.

(*n*) Under the old Statutes of Mortmain the Crown could not enter for such a forfeiture until after office found; 3 Black. Comm. 258, 259; *Doe* v. *Redfern*, 12 East, 96, 114; *Doe* d. *Evans* v. *Evans*, 5 B. & C. 587, n.; but the necessity of an inquest of office as a condition precedent to the exercise of a right of re-entry by the Crown was abolished by stat. 22 & 23 Vict. c. 21, s. 25.

(*o*) Stat. 51 & 52 Vict. c. 42, s. 2, replacing 7 & 8 Will. III. c. 37; see Co. Litt. 2b, 99a, and n. (1); 2 Black. Comm. 268 *sq.*; Wms. Real Prop. 77, 78, 23rd ed.

(*p*) Sug. V. & P. 685.

(*q*) See Shelford on Mortmain, 10, n. (*e*). By stat. 33 & 34 Vict. c. 34, corporations in the United Kingdom holding moneys in trust for any public or charitable purpose may invest such moneys on any real security authorised by or consistent with the trust without incurring any forfeiture of the lands so taken in mortgage; above, p. 432, n. (*f*).

(*r*) The Mortmain Act of 1888 expressly prohibits the assurance of land to *or for the benefit of*, and the acquisition of land by *or on behalf of*, a corporation into mortmain, except under the authority of a royal licence or statute; stat. 51 & 52 Vict. c. 42, s. 1 (1); and see stat. 15 Ric. II. c. 5, repealed by the Act of 1888; Shep. Touch. 509; 1 Sand. Uses, 339, note (*e*), 4th ed.; Lewin on Trusts, 40, 85, 6th ed.

Companies incorporated under the Companies Acts, 1862 or 1908.

table or for the public use or benefit (*s*). The most important statutory exception to the general law prohibiting a corporation from retaining land is that of joint-stock companies incorporated under the Companies Act, 1862 (*t*), or the Companies (Consolidation) Act, 1908 (*u*). These Acts have expressly empowered every such company to hold lands (*x*); save that a company formed for the purpose of promoting art, science, religion, charity or any other like object, not involving the acquisition of gain by the company or by its individual members, shall not, without the sanction of the Board of Trade, hold more than two acres of land (*y*).

Corporation cannot stand seised to another's use, but may hold on trust.

It may be noted here, with respect to the assurance of land to a corporation, that under the old doctrine of uses a corporation, having no conscience, could not stand seised of land to another person's use (*z*). It follows that, where a freehold estate is conveyed to a corporation to the use of or upon trust for another, the use will not be executed by the Statute of Uses (*a*), but the legal estate will remain in the corporation (*b*). As, however, a trust may be enforced against a corporation under the modern rules of equity (*c*), the corporation will in such case hold the legal estate on trust for the other. An Act of 1899 (*d*) enables a corporation and another to acquire and hold any property in joint tenancy. Before this Act, a gift to a corporation and another person jointly made them tenants in common (*e*).

Gifts to a corporation and another jointly.

(*s*) See Index to Statutes, Mortmain, 2, 3; Shelford on Mortmain, 27, 42 *sq.*; Tudor's Charitable Trusts, 470 *sq.*, 4th ed.; above, pp. 431, n. (*d*), 432, n. (*f*).

(*t*) Stat. 25 & 26 Vict. c. 89.

(*u*) Stat. 8 Edw. VII. c. 69.

(*x*) Stat. 8 Edw. VII. c. 69, s. 16 (2), replacing 25 & 26 Vict. c. 89, s. 18.

(*y*) Stat. 8 Edw. VII. c. 69, s. 19, replacing 25 & 26 Vict. c. 89, s. 20. These enactments also authorised the Board of Trade, by licence to empower any such company to hold lands in such quantities and subject to such conditions as the Board think fit.

(*z*) 1 Rep. 122a; 1 Sand. Uses, 59, 4th ed.

(*a*) Stat. 27 Hen. VIII. c. 10.

(*b*) Sugd. n. to Gilb. Uses, 7, 8, 3rd ed.

(*c*) Lewin on Trusts, 30, 6th and 12th ed.; *Re Thompson's Settlement Trusts*, 1905, 1 Ch. 229, 232.

(*d*) Stat. 62 & 63 Vict. c. 20, passed 9th Aug. 1899.

(*e*) Co. Litt. 189, 190a; Bac. Abr. Joint Tenants (B); *Law Guarantee, &c. Socy.* v. *Bank of England*, 24 Q. B. D. 406, 411.

With respect to the capacity of corporations to alienate their lands, the rule is, as we have seen (*f*), that every corporation existing as such *at the common law* (*g*) has as full capacity to dispose of its lands as a natural person free from disability. But corporations existing for public or charitable purposes have in many instances been restrained by statute from disposing freely of their lands. Thus ecclesiastical and eleemosynary corporations and colleges were restrained by statutes of Elizabeth and James I. from alienating their lands for more than twenty-one years or three lives (*h*); and the alienation of the estates of ecclesiastical corporations and colleges is now regulated by many statutes (*i*). So also the alienation of Crown lands is now controlled by statute (*k*). And municipal corporations subject to the provisions of the Municipal Corporations Act, 1882, may not alienate corporate land (except by leasing to a limited extent) without the approval formerly of the Local Government Board (*l*), and now of the Ministry of Health to whom the powers and duties of the Local Government Board have, as from the 1st July, 1919, been transferred (*m*).

Alienation of land by corporations.

Ecclesiastical corporations.

Crown lands.

Municipal corporations.

(*f*) Above, p. 914, and n. (*i*); 1 Prest. Abst. 272, 2nd ed.; *Scarborough Corpn.* v. *Cooper*, 1910, 1 Ch. 68, 71.

(*g*) It should be noted that one method of creating a corporation at common law is by Act of Parliament; 10 Rep. 29b; 1 Black. Comm. 473. But a distinction must be carefully drawn between corporations created by Act of Parliament with the nature and qualities of a corporation at common law and those created by statute for particular purposes; see Bowen, L. J., *Wenlock* v. *River Dee Co.*, 36 Ch. D. 675, 685, n.; below, p. 918.

(*h*) See Co. Litt. 43a, 44a; *Magdalen College case*, 11 Rep. 66b; *Magdalen Hospital* v. *Knotts*, 4 App. Cas. 324; *Rickard* v. *Graham*, 1910, 1 Ch. 722, 729.

(*i*) See Index to Statutes, Colleges (2), Corporation (2), Ecclesiastical Commission (3), Lease (3); Davidson, Prec. Conv. vol. 2, pt. 1, p. 460, n., 4th ed.; 1 Key & Elph. Prec. Conv. 717, 891, 10th ed.

(*k*) See Index to Statutes, Crown Lands and Land Revenues; Wms. Real Prop. 57, n. (*l*), 23rd ed.

(*l*) Stats. 45 & 46 Vict. c. 50, ss. 6, 108, 109, amended by 51 & 52 Vict. c. 41, s. 72 (see s. 100), and replacing 5 & 6 Will. IV. c. 76, ss. 94, 96; 6 & 7 Will. IV. c. 104, s. 2; *Davis* v. *Leicester Corp.*, 1894, 2 Ch. 208; *Re Plymouth Corpn. and Walter*, 1918, 2 Ch. 354. Before the commencement of the Local Government Act, 1888, stat. 51 & 52 Vict. c. 41, s. 72, this approval had to be given by the Treasury. Municipal corporations may, with the approval of the Local Government Board, dispose of their corporate land in consideration of a perpetual yearly rentcharge to issue thereout; *Scarborough Corpn.* v. *Cooper*, 1910, 1 Ch. 68.

(*m*) Ministry of Health Act, 1919, 9 & 10 Geo. V. c. 21, ss. 3 (1) (a), 11 (1); Ministry of Health Act, 1919 (Date of Commencement), Order, 1919, 63 Sol. J. 644.

Corporations created by statute for particular purposes.

Corporations created by statute for particular purposes stand on a different footing from corporations existing at the common law, and may not dispose of their corporate property in any manner which is extraneous to the purposes for which the corporation was created (*n*). Thus railway companies, having the usual powers under their special Act to take and use land for the purpose of the railways and works, cannot alienate their land, or any estate or interest therein, otherwise than for the purposes of the Act (*o*); excepting only such land as they may dispose of as being superfluous land under the Lands Clauses Act, 1845 (*p*), or as having been taken for extraordinary purposes under the Railways Clauses Act, 1845 (*q*). On the same principle, where a company, which was incorporated for the navigation of a river by a statute silent as to any borrowing powers, and which had been empowered by a subsequent Act to borrow up to a limited amount upon mortgage of its lands, borrowed in excess of the limit and purported to charge its

Railway companies.

River navigation company.

(*n*) *Eastern Counties Ry. Co.* v. *Hawkes*, 5 H. L. C. 331, 345-348; *Ashbury, &c. Co.* v. *Riche*, L. R. 7 H. L. 653; *A.-G.* v. *Great Eastern Ry. Co.*, 5 App. Cas. 473, 478, 481, 486; *Wenlock* v. *River Dee Co.*, 36 Ch. D. 675, 685, n., 10 App. Cas. 354, 359-363; *A.-G.* v. *Fulham Corpn.*, 1921, 1 Ch. 440, 449, 450.

(*o*) *Mulliner* v. *Midland Ry. Co.*, 11 Ch. D. 611; *Re Metropolitan District Ry. Co. and Cosh*, 13 Ch. D. 607; *Hobbs* v. *Midland Ry. Co.*, 20 Ch. D. 418; *Re Gonty and Manchester, &c. Ry. Co.*, 1896, 2 Q. B. 439, 447, 449, 450; *Gt. Central Ry.* v. *Balby-with-Hexthorpe U. D. C.*, 1912, 2 Ch. 110 (as to dedicating a right of way over the railroad); *County Hotel and Wine Co.* v. *L. & N. W. Ry.*, 1918, 2 K. B. 251, 266-271; affd. on other grounds, 1919, 2 K. B. 29, 1921, 1 A. C. 85. But a stranger may by adverse possession obtain a good title under the Statute of Limitations as against such a company; *Midland Ry. Co.* v. *Wright*, 1901, 1 Ch. 738.

Superfluous lands.

(*p*) Stat. 8 & 9 Vict. c. 18, ss. 127 *sq.* Superfluous lands (*i.e.*, those not required for the purposes of the undertaking) are required to be sold within the period prescribed by the special Act, or, if no period be so prescribed, within ten years after the time limited by the special Act for the completion of the works; and in default thereof such lands vest at the end of that period in the owners of the lands adjoining thereto in proportion to the extent of their adjoining lands. But before being sold, such lands, unless situate in a town or built upon or used for building purposes, are required to be offered, first, to the person then entitled to the lands whence the same were originally severed, and if such person refuse to purchase them or cannot be found, then to the adjoining owner or owners. And any such right of pre-emption will cease if not accepted within six weeks. As to the sale of superfluous lands, see *London and South Western Ry. Co.* v. *Gomm*, 20 Ch. D. 562; *Re Thackwray and Young's Contract*, 40 Ch. D. 34; above, p. 189.

(*q*) Stat. 8 & 9 Vict. c. 20, s. 45; see 8 & 9 Vict. c. 18, s. 13; *City of Glasgow Union Ry. Co.* v. *Caledonian Ry. Co.*, L. R. 2 Sc. App. 160; *Mulliner* v. *Midland Ry. Co.*, 11 Ch. D. 611, 621.

lands with the repayment of the money so borrowed, the charge was held to be void (*r*). And a canal company incorporated by a private Act for the purpose of constructing and working a canal was held to be unable to sell the canal or assign its undertaking (*s*). So also companies incorporated under the Companies Act, 1862, or the Companies (Consolidation) Act, 1908 (*t*), are not at liberty to dispose of their property in any manner which is inconsistent with their objects as defined in their memorandum of association (*u*). If therefore such a company convey away its land by way of sale, mortgage, or otherwise, the conveyance is valid if the transaction were expressly or impliedly authorised by its memorandum of association (*v*): but if not, the assurance is void. It may be remarked that a trading company is by necessary implication empowered to raise money by the sale, mortgage or pledge of its assets (*v*). It should be noted that where a statutory corporation created for particular purposes does any act, which is void as being *ultra vires*, the act cannot be ratified or rendered valid by the assent thereto of every individual corporator or shareholder (*x*). Here it may be mentioned that, if a corporation be created by statute for particular purposes with capacity to hold land and to contract debts in such manner that the land can be taken in execution to satisfy the debts, it may lawfully give a charge upon land in favour of a creditor to secure payment of a pre-existing debt, which he might otherwise have enforced by suing the corporation and taking the land in execution (*y*). We may also notice that a corporation authorised by some statute to acquire and hold land for some particular purpose may not use its land acquired under that Act for any other

Companies incorporated under the Companies Acts, 1862 or 1908.

Trading company generally empowered to sell, or mortgage its property.

User of corporate lands acquired under statute for particular purposes.

(*r*) *Wenlock* v. *River Dee Co.*, 10 App. Cas. 354; *Wenlock* v. *River Dee Co.*, 36 Ch. D. 674, 38 Ch. D. 534. But where the money borrowed is used to discharge existing liabilities and there is no increase in the indebtedness of the company, the money can be recovered; *Reversion Fund, &c. Co., Ld.* v. *Maison Cosway, Ld.*, 1913, 1 K. B. 364, 373-384.

(*s*) *Re Woking Urban Council, &c. Act* (1911), 1914, 1 Ch. 300.

(*t*) Above, p. 916.

(*u*) *Ashbury, &c. Co.* v. *Riche*, L. R. 7 H. L. 653; *Wenlock* v. *River Dee Co.*, ubi sup.

(*v*) *Re Patent File Co.*, L. R. 6 Ch. 83; *General Auction, &c. Co.* v. *Smith*, 1891, 3 Ch. 432; *Re Kingsbury Collieries, Ltd. and Moore's Contract*, 1907, 2 Ch. 259; and see *Re David Payne & Co., Ltd.*, 1904, 2 Ch. 608.

(*x*) See cases in note (*u*), above; *secus* as to acts which are not void as being *ultra vires*, *Re Express Engineering Works, Ld.*, 1920, 1 Ch. 466; *Re Oxted Motor Co., Ld.*, 1921, 3 K. B. 32.

(*y*) *Stagg* v. *Medway, &c. Co.*, 1903, 1 Ch. 169.

purpose than that contemplated by the Act (*z*), and cannot bind itself or the land so acquired by restrictive covenants inconsistent with the object of the Act (*a*).

Conveyance *ultra vires* by statutory corporation.

Purchase *ultra vires* by statutory corporation.

A conveyance made by a statutory corporation of its land, of which it has no power to dispose, is altogether void and passes no estate therein to the grantee: but if he take possession under the grant, he may acquire a title to the land under the Statutes of Limitation (*b*). It appears, however, that if a statutory corporation, by an application of its money which is *ultra vires*, purchase and take a conveyance of land, the transaction is not illegal and void, but the corporation acquires the legal estate and the land as its property, the vendor being estopped from impeaching his own sale (*c*). And it is thought that the corporation would have power to sell the land so acquired by analogy to the power given to trustees to sell land purchased by them as an unauthorised investment of their trust money (*d*).

Lands held by a corporation on trust—or for charitable purposes.

If lands be vested in a corporation upon any trust, its power to dispose thereof depends upon the general law regulating the alienation of property held in trust (*e*). And if a corporation hold land upon any charitable trust or for any charitable purpose, the alienation thereof is subject to the general law governing the conveyance of charity lands (*f*).

Contracts by corporations.

The capacity of a corporation to contract, whether with respect to its property or otherwise, is determined by the same principles exactly as regulate its capacity to dispose of its land (*g*). If it

(*z*) *A.-G.* v. *Pontypridd, &c. Council,* 1905, 2 Ch. 441, 452, affirmed, 1906, 2 Ch. 257.

(*a*) *Ayr Harbour Trustees* v. *Oswald,* 8 App. Cas. 623; *South Eastern Ry. Co. and Wiffin's Contract,* 1907, 2 Ch. 366; cf. *Stourcliffe Estates Co., Ltd.* v. *Bournemouth Corpn.,* 1910, 2 Ch. 12; and see above, pp. 468, n. (*x*), 918, n. (*o*).

(*b*) *Re Woking Urban Council, &c. Act,* 1911, 1914, 1 Ch. 300; cf. above, p. 429.

(*c*) *Ayres* v. *South Australian Banking Co.,* L. R. 3 P. C. 548, 558, 559; *Great Eastern Ry.* v. *Turner,* L. R. 8 Ch. 149, 152; *Re Coitman,* 19 Ch. D. 64; *National Telephone Co.* v. *St. Peter Port Constables,* 1900, A. C. 317, 321; *Towers* v. *African Tug Co.,* 1904, 1 Ch. 558, 567, 571, 572; Buckley's Companies Acts, 11, 9th ed.; 1 Lindley on Companies, 215, 6th ed.

(*d*) See above, p. 270 and n. (*v*).

(*e*) Above, pp. 241 *sq.*, and see pp. 534-536.

(*f*) Above, pp. 425, 437-443; *A.-G.* v. *National Epileptic Hospital,* 1904, 2 Ch. 252.

(*g*) Above, pp. 917-920.

be a corporation at common law, it has, as a rule, the like capacity of contracting as is enjoyed by any natural person free from disability (*h*). If the corporation be a common law corporation controlled by statute (*i*), as in the case of ecclesiastical corporations and colleges, municipal corporations (*k*) and many charitable corporations, its capacity of contracting of course depends on the provisions of the Acts, which have curtailed or regulated its powers. And if the corporation were created by statute for particular purposes, it is enabled to enter into any contract consistent with those purposes (*l*) and not exceeding any powers expressly conferred upon it (*m*): but if the corporation purport to make any contract inconsistent with the objects of its being or in excess of its express powers, the agreement will be void (*n*). The capacity of any corporation to contract is also qualified by the general rule of law, that a corporation can only bind itself by deed under its corporate seal (*o*); so that, as a rule, the contract of a corporation must be evidenced by deed under its corporate seal, or must be made by an agent authorised under its corporate seal to contract on its behalf (*p*). To this

Corporations can, as a rule, only bind themselves by deed.

(*h*) Above, p. 914, n. (*g*); *A.-G.* v. *Newcastle-upon-Tyne Corpn.*, 23 Q. B. D. 492, 495, 497, 1892, A. C. 568; *A.-G.* v. *Manchester Corpn.*, 1906, 1 Ch. 643, 651. And in the case of a corporation created by Royal Charter, even acts expressly prohibited by the Charter are not invalid; *British South Africa Co.* v. *De Beers, &c., Ltd.*, 1910, 1 Ch. 354, 374-376, affd. 1910, 2 Ch. 502, reversed on the facts, 1912, A. C. 52; but see 26 L. Q. R. 320; *Jenkin* v. *Pharmaceutical Society*, 1921, 1 Ch. 392, 398. Corporations have the same power to compromise claims as a natural person has; *Holsworthy Urban Council* v. *Holsworthy Rural Council*, 1907, 2 Ch. 62, 73.

(*i*) Above, p. 917.

(*k*) See *A.-G.* v. *Manchester Corpn.*, 1906, 1 Ch. 643, 651; *A.-G.* v. *De Winton*, 1906, 2 Ch. 106.

(*l*) See *General Auction, &c. Co.* v. *Smith*, 1891, 3 Ch. 432; *Stagg* v. *Medway, &c. Co.*, 1903, 1 Ch. 169.

(*m*) *Wenlock* v. *River Dee Co.*, 10 App. Cas. 354.

(*n*) Above, p. 919, nn. (*r*), (*u*); *Corbett* v. *South Eastern, &c. Committee*, 1906, 2 Ch. 12, 20; *A.-G.* v. *Mersey Railway Co.*, 1907, A. C. 415; *A.-G.* v. *West Gloucestershire Water Co.*, 1909, 2 Ch. 338, 340; *County Hotel and Wine Co.* v. *L. & N. W. Ry.*, 1918, 2 K. B. 251, 266-271; affd. on other grounds, 1919, 2 K. B. 29; 1921, A. C. 85.

(*o*) Bac. Abr. Corporations (E, 3); 1 Black. Comm. 475.

(*p*) *Ludlow Corpn.* v. *Charlton*, 6 M. & W. 815; *Kidderminster Corpn.* v. *Hardwick*, L. R. 9 Ex. 13; *Oxford Corpn.* v. *Crow*, 1893, 3 Ch. 535. It appears that in general, as in the case of deeds executed by natural persons, any seal will do; Bract. p. 38a; Y. B. 11 Edw. IV. 4, pl. 7; 21 Edw. IV. 81, pl. 30; 10 Rep. 30b; Perk. ss. 130-134; Vin. Abr. Faits (H); Shep. Touch. 57; *Ball* v. *Dunsterville*, 4 T. R. 313; *National Provincial Bank of England* v. *Jackson*, 33 Ch. D. 1, 11, 14; Wms. Real Prop. 152, 13th, and 160, 23rd ed.; Pollock on Contract, 148, 7th ed. It is submitted that the doubt

Exceptions.

rule, however, there are certain exceptions, both at common law and by statute. The common law exceptions appear to stand on the ground of the necessity of the case, or of convenience amounting to necessity (*q*). Thus of old time an exception was allowed in matters of small importance constantly occurring, as the engagement of a domestic servant, where to require a deed would be "greatly to obstruct the every-day ordinary convenience of the body corporate, without any adequate object" (*r*). And this principle has been applied of late years to such an important matter as a contract by a municipal corporation possessed of a graving dock for the admission of a ship to the dock (*s*). On a similar principle it has been established in modern times that, where a corporation has been especially created for trading purposes, it may by its agents enter into all contracts necessary for or incidental to carrying on its trade in the same manner as a natural person may; and it will be bound by such contracts, although neither the agreement itself nor the agent's authority be evidenced by deed (*t*). And the weight of authority is in favour of the opinion that the principle of this exception is not confined to the case of trading corporations, and that any corporation specially created

Necessary matters of daily occurrence.

Corporations created for trading purposes.

Corporations specially created for particular purposes.

expressed in Grant on Corporations, 59, is not well founded. Every limited company incorporated under the Companies Acts, 1862 or 1908, is required to have its name engraven in legible characters on its seal; and the use by any director, manager, officer or other person on behalf of the company of any seal, purporting to be a seal of the company, whereon its name is not so engraven renders him liable to a fine not exceeding 50*l.*; stat. 8 Edw. VII. c. 69, s. 63 (1 *b*, 3), replacing 25 & 26 Vict. c. 89, ss. 41, 42. Like provisions are enacted with respect to societies incorporated under the Industrial and Provident Societies Act, 1893 (stat. 56 & 57 Vict. c. 39, ss. 12, 21, 66). And under the Building Societies Act, 1874, the seal of any society incorporated thereunder is required to bear the registered name thereof; stat. 37 & 38 Vict. c. 42, ss. 9, 16 (10). It is thought that in all these cases the provisions enacted do not avoid, as against the corporation, a deed executed on its behalf under a different kind of seal; see *Wright* v. *Horton*, 12 App. Cas. 371, 377, 380, 384; *H. E. Randall, Ltd.* v. *British and American Shoe Co.*, 1902, 2 Ch. 354, 358; Pollock on Contract, 157, 9th ed.

(*q*) *Church* v. *Imperial Gas, &c. Co.*, 6 A. & E. 846, 861; and see *Wells* v. *Kingston-upon-Hull*, L. R. 10 C. P. 402.

(*r*) Bac. Abr. Corporations (E, 3); Vin. Abr. Corporations (K); *Ludlow Corpn.* v. *Charlton*, 6 M. & W. 815, 821; and see *R.* v. *Bigg*, 3 P. W 419, 423-427, 438.

(*s*) *Wells* v. *Kingston-upon-Hull*, L. R. 10 C. P. 402.

(*t*) *Beverley* v. *Lincoln Gas, &c. Co.*, 6 A. & E. 829; *Church* v. *Imperial Gas, &c. Co.*, ib. 846, 861; *Ludlow* v. *Charlton*, 6 M. & W. 815, 821; *Henderson* v. *Australian, &c. Navigation Co.*, 5 E. & B. 409; *South of Ireland Colliery Co.* v. *Waddle*, L. R. 3 C. P. 463, 4 C. P. 617.

for particular, though not for trading purposes, may make contracts necessary for effecting those purposes without seal (*u*). But no more has been actually decided than that such a corporation is bound by contracts of this kind, made without seal, where the contract has been *executed* in its favour (*x*). And this exception does not apply in cases where a corporation is prohibited by statute from making a contract otherwise than by deed (*y*). The statutory exceptions arise where a corporation is authorised by Act of Parliament to contract without deed. Of these the most important relate to contracts proveable, as between natural persons, by signed writing or word of mouth only, and made by companies established by special Act of Parliament incorporating the Companies Clauses Act, 1845 (*z*), or companies incorporated under the Companies Act, 1862 (*a*), or the Companies (Consolidation) Act, 1908 (*b*).

Statutory exceptions.

Companies regulated by the Companies Clauses Act, 1845.

Companies incorporated under the Companies Acts, 1862 or 1908.

(*u*) *Clarke* v. *Cuckfield Union,* 21 L. J. Q. B. 349; *Nicholson* v. *Bradfield Union,* L. R. 1 Q. B. 620; *Lawford* v. *Billericay, &c. Council,* 1903, 1 K. B. 772, 784-787; *Douglass* v. *Rhyl Urban District Council,* 1913, 2 Ch. 407. See Pollock on Contract, 160, 166, 9th ed.

(*x*) See cases cited in previous note. See Adler on Corporations, 84-98.

(*y*) *Hunt* v. *Wimbledon Local Board,* 4 C. P. D. 48; *Young* v. *Leamington Corpn.,* 8 App. Cas. 517; *Hoare* v. *Kingsbury Urban District Council,* 1912, 2 Ch. 452, 464-467. A corporation may, however, lawfully pay for work done for it under its contract required by law to be made, but not in fact made, under seal; and may by a subsequent deed ratify such a contract so made; *Bournemouth Commrs.* v. *Watts,* 14 Q. B. D. 87; *Brooks, Jenkins & Co.* v. *Torquay Corpn.,* 1902, 1 K. B. 601, 607, 608.

(*z*) Stat. 8 & 9 Vict. c. 16. By ss. 90, 95, the powers of contracting enjoyed by such companies may be exercised by the directors, or by a committee of them entrusted with the exercise of such powers. And by s. 97, the power which may be granted to any such committee to make contracts, as well as the power of the directors to make contracts on behalf of the company, may lawfully be exercised—(1) with respect to any contract which, if made between private persons, would be by law required to be in writing and under seal, by such committee or the directors in writing under the common seal of the company; (2) with respect to any contract which, if made between private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, by such committee or the directors in writing signed by such committee or any two of them, or any two of the directors; and (3) with respect to any contract which, if made between private persons, would by law be valid although made by parol only and not reduced into writing, by such committee or the directors by parol only, without writing. And contracts so made on behalf of the company may be varied or discharged in the same manner in which they were made.

(*a*) Stat. 25 & 26 Vict. c. 89.

(*b*) Stat. 8 Edw. VII. c. 69. Under s. 76 of this Act, replacing s. 37 of the Companies Act, 1867 (stat. 30 & 31 Vict. c. 131), contracts on behalf of any company so incorporated may be made as follows:—

Contract by a corporation for sale or purchase of land.

It follows from these principles that a contract by a corporation for the sale or purchase of land must, as a rule, be made under its corporate seal (*c*), or under the hand of its agent authorised under the corporate seal (*c*) to contract on its behalf (*d*). And where the corporate seal (*c*) is affixed to the written memorandum of the contract, that is equivalent to the signature thereof required by the Statute of Frauds (*e*). It appears that, where the objects of a corporation created for trading purposes include the sale or purchase of land, contracts for these purposes may be made on its behalf without seal (*f*): but it should be noted that trading purposes do not, in general, include the sale or purchase of land; and it is thought that, unless traffic in land were comprehended in the objects of the corporation, the case would be governed by the general rule (*g*). In the case of an *executory* contract for the sale or purchase of land to be made with a corporation specially created for particular objects, but not for trading, it would not be safe, in the present state of the authorities, to rely upon a written memorandum not sealed on behalf of the corporation, or signed by an agent not authorised under its corporate seal, even where the objects of incorporation include the sale or purchase of land (*h*). Contracts for the sale or purchase of land by companies regulated by the Companies Clauses Act, 1845, or incorporated under the Companies Acts, 1862 or 1908, may be made in the forms authorised by statute with regard to such companies respec-

Trading corporations.

Corporations created for particular purposes.

Companies.

(1) Any contract which, if made between private persons, would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company; (2) any contract which, if made between private persons, would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied; and (3) any contract which, if made between private persons, would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied. And any contract so made on behalf of the company may be varied or discharged in the same manner in which it was made.

(*c*) See above, p. 921, n. (*p*).

(*d*) *Kidderminster Corpn.* v. *Hardwick*, L. R. 9 Ex. 13; *Oxford Corpn.* v. *Crow*, 1893, 3 Ch. 535; Sug. V. & P. 145; 1 Dart, V. & P. 189, 5th ed.; 217, 6th ed.

(*e*) *Doe* v. *Hogg*, 1 B. & P. N. R. 306; Sug. V. & P. 730.

(*f*) Above, p. 922, and n. (*t*).

(*g*) See above, pp. 446, 447.

(*h*) See above, p. 922.

tively (*i*); and it is not necessary that the contract should be executed under the corporate seal, or that the company's agent to sign the memorandum should be authorised under that seal (*k*).

Contracts not binding corporations at law are not enforceable in equity.

Doctrine of part performance as affecting a corporation.

Where a contract purporting to have been made on behalf of a corporation is void at law for want of a deed, the agreement is not enforceable in equity on the ground that the corporation has had the benefit of it (*l*). But a corporation may be affected by the equities arising from the part performance of a parol agreement for the sale or letting of land (*m*). And this doctrine is applicable, not only in all cases where the corporation would have been bound by the alleged contract, if put into writing and signed by its agent (*n*); but also as against a corporation having the full powers of a corporation at common law (*o*), but being subject to the common law rule (*p*) requiring its contracts to be evidenced by deed (*q*). It is considered, however, that the doctrine of part performance cannot be invoked so as to bind a corporation to the specific performance of any agreement which is outside its powers (*r*), or which it is by statute *prohibited* from making otherwise than by deed (*s*).

Estoppel as against a corporation.

A corporation, as well as a natural person, is subject to the rule of estoppel, both at law and in equity, and may be so precluded from asserting the untruth of a statement made under its corporate seal, or of a representation made within the general scope of their authority by the words or conduct of those who are the

(*i*) Above, p. 923, nn. (*z*), (*b*).

(*k*) *Beer* v. *London and Paris Hotel Co.*, L. R. 20 Ex. 412; *Jones* v. *Victoria Graving Dock Co.*, 2 Q. B. D. 314.

(*l*) *Kirk* v. *Bromley Union*, 2 Ph. 640; *Crampton* v. *Varna Ry. Co.*, L. R. 7 Ch. 562, 568; *Hunt* v. *Wimbledon Local Board*, 3 C. P. D. 208, 214, 4 C. P. D. 48.

(*m*) Above, pp. 12, 13; *Wilson* v. *West Hartlepool Ry. Co.*, 34 Beav. 187, 2 De G., J. & S. 475, 492, 493, as to which see *Hunt* v. *Wimbledon Local Board*, 4 C. P. D. 48, 61, 62.

(*n*) Above, pp. 922, 923.

(*o*) Above, pp. 914, 921.

(*p*) Above, p. 921.

(*q*) *Crook* v. *Seaford Corpn.*, L. R. 10 Eq. 678, 6 Ch. 551; Kelly, C. B., *Kidderminster Corpn.* v. *Hardwick*, L. R. 9 Ex. 13, 18; *Melbourne Banking Corpn.* v. *Brougham*, 4 App. Cas. 156, 169; Fry, Sp. Perf. §§ 491, 648, 3rd ed.; Dart, V. & P. 236, 1030, 5th ed.; see also *Doe* v. *Taniere*, 12 Q. B. 998, 1013.

(*r*) Above, p. 921.

(*s*) See cases cited above, p. 923, n. (*y*); Fry, Sp. Perf. § 491, 3rd ed.; Pollock on Contract, 141, 9th ed.; so held, *Hoare* v. *Kingsbury Urban Council*, Neville, J., 1912, 2 Ch. 452.

proper persons to manage its affairs (*t*). A corporation may also be affected, owing to the conduct of such persons, by the like equity as arises against a natural person, who having good right to eject another from his land, lies by without asserting his title and knowingly suffers the other to remain in possession and lay out money on buildings or improvements (*u*). It is thought that, as in the case of the equities arising from part performance, this equity cannot be asserted against a corporation so as to compel it to perform *specifically* any act in excess of its powers (*x*). But under this head of equity a corporation may be ordered to pay *compensation* to the aggrieved person, notwithstanding that it be disabled from fulfilling his expectations by confirming him in his possession (*y*).

Misrepresentation by the agent of a corporation.

Where a contract made with a corporation for the sale or purchase of land is induced by the misrepresentation of the corporation's agent, the rights of the party misled to rescind the contract, or to affirm it and claim compensation for his loss, are the same as if the agent's principal had been a natural person, who was himself innocent of fraud (*z*). A corporation, as well as a natural person innocent of fraudulent intent (*a*), may be made liable in an action of deceit for a false representation knowingly or recklessly made by its agent within the general scope of his authority (*b*), even though made by the agent for

Liability of a corporation in an action of deceit for its agent's fraudulent misrepresentation.

(*t*) *Re Bahia and San Francisco Ry. Co.*, L. R. 3 Q. B. 584; *Webb* v. *Herne Bay Commrs.*, L. R. 5 Q. B. 642; *Burkinshaw* v. *Nicolls*, 3 App. Cas. 1004; *Shaw* v. *Port Philip, &c. Co.*, 13 Q. B. D. 103; *Balkis Co.* v. *Tomkinson*, 1893, A. C. 396; and see *George Whitechurch, Ld.* v. *Cavanagh*, 1902, A. C. 117; *Ruben* v. *Great Fingall Consolidated, Ld.*, 1904, 2 K. B. 712, 1906, A. C. 439.

(*u*) *Oxford's case*, 1 Ch. Rep. 1; *Ramsden* v. *Dyson*, L. R. 1 H. L. 129, 141; *Crook* v. *Seaford Corpn.*, L. R. 6 Ch. 551, 554; *Crampton* v. *Varna Ry. Co.*, L. R. 7 Ch. 562, 568; *Hunt* v. *Wimbledon Local Board*, 4 C. P. D. 48, 62; *Plimmer* v. *Mayor, &c. of Wellington*, 9 App. Cas. 699, 710; *A.-G. to Prince of Wales* v. *Collom*, 1916, 2 K. B. 193, 203; and see 2 White & Tudor, L. C. Eq. I. 475, II. 473, 8th ed.

(*x*) See note (*s*), above, p. 925.

(*y*) *Magdalen College Case*, 11 Rep. 66b; *Oxford's case*, 1 Ch. Rep. 1, 6; and see *Balkis Co.* v. *Tomkinson*, 1893, A. C. 396, 407; *Ruben* v. *Great Fingall Consolidated, Ld.*, 1904, 2 K. B. 712; 1906, A. C. 439.

(*z*) Above, p. 802 and n. (*t*); and cases cited in note (*b*), below.

(*a*) Above, pp. 805, 806.

(*b*) *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259; *Mackay* v. *Commercial Bank of New Brunswick*, L. R. 5 P. C. 394; *Swire* v. *Francis*, 3 App. Cas. 106; *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317; *Citizens' Life Assurance Co.* v. *Brown*, 1904, A. C.

his own private purposes (*c*); but not for a false representation fraudulently made by the agent outside the scope of his authority (*d*). If on a sale or purchase of land by a corporation, any misrepresentation, whether innocent or fraudulent, be made by the other party to the contract or his agent, the corporation has exactly the same rights as a natural person would have in similar circumstances (*e*).

Misrepresentation made to a corporation.

It will be seen from the above(*f*) statement of the law relating to corporations that, whenever a sale, mortgage or other assurance of land to, in trust for, or by a corporation forms any part of the title, which a conveyancer is investigating on behalf of an intending purchaser or mortgagee, he must direct his attention to the following points:—In the first place, he must satisfy himself that there is, or was at the date of the assurance, such a corporation as stated in the abstract; and for this purpose he should require evidence of the incorporation, unless the existence of the corporation be sufficiently notorious to enable him to dispense with proof (*g*). Then he must ascertain whether the corporation were empowered by licence in mortmain or otherwise to hold land (*h*); and if the corporation were only invested with a limited power of holding lands (*i*), he must require evidence that in holding the land in question it did not exceed its powers. With regard to the assurance of land by a corporation, it must be considered whether the assuror were a corporation at common law and unrestricted by statute, a corporation at common law but controlled by statute, or a corporation created

Points to be noted where an assurance to or by a corporation forms part of a title.

423, 426, 428; *S. Pearson & Son, Ltd.* v. *Dublin Corpn.*, 1907, A. C. 351; *Kettlewell* v. *Refuge Assurance Co.*, 1908, 1 K. B. 545; 1909, A. C. 243. See *Western Bank of Scotland* v. *Addie*, L. R. 1 Sc. App. 145, 166, 167; Pollock on Torts, 293, 5th ed.

(*c*) *Lloyd* v. *Grace, Smith & Co.*, 1912, A. C. 716, overruling in this respect *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.*, 18 Q. B. D. 714; see above, p. 806 and n. (*s*).

(*d*) See *Barnett* v. *South London Tramways Co.*, 18 Q. B. D. 815; *George Whitechurch, Ld.* v. *Cavanagh*, 1902, A. C. 117, where the decision was that a limited company is not estopped from denying the truth of a false statement fraudulently made by its agent outside the scope of his authority; *Ruben* v. *Great Fingall Consolidated, Ld.*, 1904, 2 K. B. 712; 1906, A. C. 439, above, p. 925.

(*e*) Pollock on Contract, 127, 9th ed.

(*f*) Pp. 914 *sq.*

(*g*) See *Leeds Institute, &c.* v. *Leeds City Council*, 1909, 1 Ch. 500.

(*h*) Above, p. 915; and see p. 919.

(*i*) Above, pp. 915, 916.

by or under some Act of Parliament for particular purposes (*k*).

Restriction on alienation by a corporation expressed in a royal charter—

In the case of a lay corporation at common law (*l*), it appears that, if it were created by royal charter with power to hold lands, the power of alienation is incident to its ownership, and any clause in the charter purporting to restrict this power is merely declaratory of the King's desire, and of no effect in law (*m*).

or in an Act of Parliament.

But where a corporation is created by Act of Parliament, any restriction thereby placed upon its powers of alienation is perfectly valid, notwithstanding that the restriction would be void as repugnant to ownership or as contravening the rule against perpetuities if annexed to a conveyance of land made between natural persons (*n*), and although the corporation be in other respects a corporation at common law (*o*). If the corporation in question be a common law corporation controlled by statute, as ecclesiastical and municipal corporations are, or be a corporation created by or under the authority of an Act of Parliament for particular purposes, such as a railway company incorporated by special Act of Parliament or a company incorporated under the Companies Act, 1862, or the Companies (Consolidation) Act, 1908, then the conveyancer must satisfy himself that the assurance was not outside the corporation's powers (*p*). If this point is to be determined by the construction of some public statute, he must of course obtain a copy of it for himself (*q*): but if the corporation were created by private Act of Parliament or under the Companies Acts, he should require the opposite party to furnish him with a copy of the Act or of the memorandum and articles of association of the company, as the case may be, in evidence of the powers which the corporation may lawfully exercise (*r*).

Execution by a corporation of an assurance alienating corporate property.

If the abstracted assurance were not beyond the corporation's powers, the conveyancer must then consider whether the same purports to have been executed in such manner as would bind the corporation.

(*k*) Above, pp. 918, 919.
(*l*) Above, pp. 914, 917.
(*m*) *Sutton's Hospital Case*, 10 Rep. 1, 11, 30b; above, p. 921, n. (*h*).
(*n*) See *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, 1900, 2 Ch. 352, 1901, 2 Ch. 37.
(*o*) Above, p. 917 and n. (*g*).
(*p*) Above, pp. 917-920.
(*q*) See above, p. 133.
(*r*) It is thought that these documents would be evidence in proof of the abstract, and not part of the abstract itself; so that the purchaser would have to pay the expense of producing them, if not in the vendor's possession; see above, pp. 33, 43, 97, and n. (*g*), 98, 107, 114, 124.

For this purpose he must ascertain whether by the constitution of the corporation, as contained in the charter or statute of incorporation, or in the case of a company, in the deed of settlement (*s*) or the memorandum and articles of association (*t*), any particular formalities are necessary to the validity of a corporate act or are required to be observed in affixing the corporate seal; and if they be, he must see that the assurance purports to have been executed in compliance therewith (*u*).

What is necessary to effect a corporate act by a common law corporation.

According to the general law, the resolution of a majority of the corporators present at a duly convened meeting of the corporation is necessary to enable the corporation to perform a corporate act: and it appears that the corporate seal ought to be affixed at a corporate meeting to any deed so resolved to be executed (*x*): but no other formalities are prescribed for the sealing of a corporate deed (*y*). Where a corporation is governed by the general law alone, and an assurance by it has the corporate seal affixed thereto, and there is an attestation clause in a general form (*z*) to the effect that the corporation has affixed its common seal thereto, then it appears that, according to the regular practice of conveyancers on a sale (*a*), it will be presumed that the corporate seal was duly and properly affixed thereto, and evidence will not be required that the seal was affixed at a duly constituted meeting of the corporators or in pursuance of a resolution passed by a majority of those assembled at such a meeting. For where one claims as a purchaser for value and in good faith, without notice of any irregularity, under a deed of conveyance or contract executed under the common seal of a corporation, and the transaction effected by the deed is within the powers of the corporation, and it appears upon the face of the deed that the particular formalities (if any) prescribed by the constitution of the cor-

(*s*) This refers to companies incorporated under the Joint Stock Companies Acts of 1844, stat. 7 & 8 Vict. cc. 110, 113, repealed by the Companies Act, 1862; see Wms. Pers. Prop. 327, 331 and n. (*o*), 17th ed.

(*t*) Above, p. 919.

(*u*) See *D'Arcy* v. *Tamar, &c. Ry. Co.*, L. R. 2 Ex. 158; and cases cited below, p. 930, n. (*b*).

(*x*) Bac. Abr. Corporations (E, 7); *Mayor, &c. of the Staple* v. *Bank of England*, 21 Q. B. D. 160, 165, 166.

(*y*) *Re Barned's Banking Co.*, L. R. 3 Ch. 105, 116.

(*z*) Cf. above, pp. 280, 281, and n. (*c*).

(*a*) Above, p. 108.

poration for affixing the corporate seal have been duly observed, he may infer and need not ask for proof that all acts of internal management necessary to bind the corporation to the transaction in question (such as the proper convening of a meeting or the passing of a resolution by the requisite majority) have been duly performed; and the corporation will be estopped from alleging, as against him, that in consequence of some such irregularity of internal management it is not bound by the deed (*b*). If, however, anything should appear in the body or the attestation clause of the deed, which is inconsistent with or raises a doubt concerning the rightful execution thereof as a corporate act (*c*), an explanation should be asked for, and if necessary, strict proof that the deed was duly executed should be required (*d*). Thus it is thought that, where the deed of a corporation is executed with a general attestation clause (*e*), but under a plain seal and not the corporate seal (*f*), that circumstance would justify the conveyancer in demanding proof of its execution.

Where some formality is required by the constitution of the corporation.

Where the *constitution* (*g*) of a corporation requires that some special formality shall be observed in affixing the corporate seal to any instrument, then no instrument sealed with the corporate seal can be accepted by the conveyancer advising on title as a proper corporate act, unless it appear on the face of the deed that every such formality has been complied with. Thus if the deed of settlement or articles of association of a company provide that the corporate seal must be affixed to any instrument intended to bind the company in the presence of two directors at least, who shall sign the instrument, and that

(*b*) *Clarke* v. *Imperial Gas, &c. Co.*, 4 B. & Ad. 315, 325, 326; *Royal British Bank* v. *Turquand*, 6 E. & B. 327, 332; *Agar* v. *Athenæum, &c. Socy.*, 3 C. B. N. S. 725; *Re Athenæum, &c. Socy., Expte. Eagle, &c. Co.*, 4 K. & J. 549, 551; *Re County Life Assurance Co.*, L. R. 5 Ch. 288; *Mahony* v. *East Holyford Mining Co.*, L. R. 7 H. L. 869, 893, 894; *County of Gloucester Bank* v. *Rudry, &c. Co.*, 1895, 1 Ch. 629; *London Freehold, &c. Co.* v. *Suffield*, 1897, 2 Ch. 608; *Re Bank of Syria*, 1900, 2 Ch. 272, 278, 1901, 1 Ch. 115, 121; *Duck* v. *Tower Galvanizing Co.*, 1901, 2 K. B. 314; *Re Fireproof Doors, Ld.*, 1916, 2 Ch. 142, 149, 150; *Dey* v. *Pullinger Engineering*, 1921, 1 K. B. 77.

(*c*) Above, p. 929.

(*d*) See above, pp. 108-110.

(*e*) Above, p. 929.

(*f*) Above, p. 921, n. (*p*).

(*g*) See above, p. 929.

the secretary shall countersign the same (*h*), a deed not executed in conformity with these requirements is of no effect in law to bind the company (*i*); and objection must be taken to it accordingly. If, however, it appear from the attestation clause and otherwise on the face of the instrument that it has been sealed and signed in accordance with these conditions, it may be accepted as regularly executed, and inquiry need not be made nor proof required whether the persons who have signed the deed as directors and secretary were duly appointed to their offices (*k*).

Incorporated building societies.

In the case of building societies incorporated under the Building Societies Act, 1874 (*l*), the constitution of the corporation is contained partly in the Building Societies Acts (*l*) and partly in the registered rules, which must contain provision for the device, custody and use of the seal of the society (*m*). And the seal must in all cases bear the registered name of the society (*m*). Conveyancers advising on title must therefore see that any assurance by such a society purports to have been executed as required by the rules. Societies incorporated under the Industrial and Provident Societies Acts are regulated by similar provisions (*n*).

Industrial and provident societies.

Forgery of the deed of a corporation.

It must not be forgotten that the deed of a corporation may be forged, even though it bear the impression of the real corporate seal, and notwithstanding that such seal were affixed thereto (but without authority) by the person entrusted with its custody (*o*). An instrument so forged has no more effect than a deed forged in the name of a natural person (*p*).

(*h*) See Palmer, Company Precedents, i. 733, 817, 12th ed.; stat. 8 Edw. VII. c. 69, 1st Sched. Table A, art. 76.

(*i*) *Re Fireproof Doors, Ld.*, 1916, 2 Ch. 142, 145, 150.

(*k*) See cases cited above, p. 930, n. (*b*).

(*l*) Stat. 37 & 38 Vict. c. 42, amended by 38 & 39 Vict. c. 9; 40 & 41 Vict. c. 63; 47 & 48 Vict. c. 41; and 57 & 58 Vict. c. 47.

(*m*) Stat. 37 & 38 Vict. c. 42, s. 16 (10). See Encyclopædia of Forms, iii. 4, 9, 10, 19.

(*n*) See Stat. 56 & 57 Vict. c. 39, ss. 10, 21, 36, 37, and Sched. II. No. 11, consolidating the provisions of repealed Acts of 1862, 1867, 1871, and 1876.

(*o*) *Bank of Ireland* v. *Trustees of Evans' Charities*, 5 H. L. C. 389; *Corpn. of the Staple* v. *Bank of England*, 21 Q. B. D. 160; *Ruben* v. *Great Fingall Consolidated, Ld.*, 1904, 2 K. B. 712, 1906, A. C. 439.

(*p*) Above, p. 818.

Dissolution of a corporation.

It is asserted in Coke upon Littleton (*q*) that, upon the dissolution of a corporation, any lands, of which it was seised in fee simple, do not escheat to the lord of the fee, but revert to the grantor or his representatives; for that on the grant of lands to a corporation (*r*) there is a condition implied in law that, if the corporation cease to exist, the grantor or his heirs may re-enter. And this proposition has been accepted without question by many eminent judges, text-writers and conveyancers (*s*). Mr. Hargrave, however, in a note to his edition of Coke upon Littleton (*t*), pointed out that there are important authorities (*u*) to the effect that lands held in fee by a corporation *do* escheat, upon its dissolution, in the same manner exactly as lands held by a natural person dying intestate and without heirs; and he himself obviously doubted the accuracy of Lord Coke's statement. And Professor Gray of Harvard, in his learned and original treatise upon the Rule against Perpetuities (*x*), has entered into a critical examination of the point in dispute, and has shown that the rule alleged by Lord Coke rests on no certain warrant of judicial decision, but the weight of authority is in favour of the conclusion that in the event above mentioned the land *shall* escheat. The author submits that this is the better opinion (*y*). In the case of *Hastings Corporation* v. *Letton*,

(*q*) Co. Litt. 13b.

(*r*) It may be noted that on the grant of land to a corporation *aggregate*, they take an estate in fee simple although the land be not limited to them *and their successors*, or since the end of the year 1881 to them *in fee simple;* Co. Litt. 94b.

(*s*) Hardwicke, C., *A.-G.* v. *Gower*, 9 Mod. 224, 226; Mansfield, C. J., *Burgess* v. *Wheate*, 1 W. Bl. 123, 165; Black. Comm. i. 484, ii. 256; 1 Prest. Abst. 272, 2nd ed.; Lewis on Perpetuities, 621; *Colchester Corpn.* v. *Brooke*, 7 Q. B. 339, 384; Grant on Corporations, 303; Challis, R. P. 199, 2nd ed.; Darling, J., *Hastings Corpn.* v. *Letton*, 1908, 1 K. B. 378, 384; *Re Woking Urban District (Basingstoke Canal) Act*, 1911, 1914, 1 Ch. 300.

(*t*) Co. Litt. 13a, n. (2).

(*u*) *Johnson* v. *Norway*, Winch, 37; *Southwell* v. *Wade*, 1 Rolle, Abr. 816 (Escheat, A, 3); *S. C.*, Poph. 91.

(*x*) (Boston, 1886), §§ 44-51; pp. 32-37; §§ 44-51a, 3rd ed.

(*y*) This submission was made in the first and second editions of this book (see p. 871, 1st ed.; 963, 2nd ed.), and has since been supported by a Note by the late Mr. Charles Sweet to Challis on Real Property, App. VI. 467, 468, 3rd ed. Lord Coke's doctrine involves the acceptance of more than one anomaly, which would disappear if it were established that the devolution of land vested in a corporation becoming extinct by dissolution is governed by the law of escheat. Thus, to maintain this doctrine, it has to be admitted, in the case of freeholds, that a corporation does not acquire a fee simple absolute, but takes a determinable fee subject to a possibility of reverter to the grantor or his heirs; see Mansfield, C. J., 1 W. Black. 165; 2 Black. Comm.

Hastings Corpn. v. *Letton.*

however, Lord Coke's doctrine was again asserted; it was held that a lease for a term of years granted to a corporation is subject to the implied condition that the land shall revert to the grantor, if the corporation shall cease to exist; and the Court decided that upon the dissolution of the corporation the term did not vest in the Crown as *bona vacantia*, but the reversion was accelerated and the term became extinct (*z*). It is respectfully submitted that this decision was incorrect (*a*). But the

265; and it seems to be the better opinion that since the statute of *Quia Emptores*, 18 Edw. I. c. 1, such an estate can no longer exist in the case of a natural person; see Third Report of Real Property Commrs., p. 36; Gray on Perpetuities, §§ 13, 31-37, 3rd ed.; Challis on Real Property, Chap. XVII. and Appx. iv., 3rd ed. But as it has never been doubted that a corporation may alien its land for an absolute estate in fee simple, or such lesser estate as was granted to it, free from all possibility of reverter to the grantor or his heirs, this fact has to be reconciled with Lord Coke's doctrine by asserting that a corporation has an absolute fee simple for the purposes of alienation, though it takes only a determinable fee for the purposes of enjoyment; 1 Prest. Abst. 272, 2nd ed. Such a theory is entirely at variance with the general principle of English law that a man can give no better title than he has. The matter is, however, explicable if it be remembered that the doctrine, that a gift of land to a corporation is subject to a condition that the land shall revert to the grantor or his heirs if the corporation cease to exist, is properly referable only to the time before the statute of *Quia Emptores* when such a gift might be made by way of subinfeudation; see 2 Black. Comm. 256, 257. In those early times such a gift was strictly analogous to a gift of land to a natural person and his heirs, which would escheat to the donor or his heirs on failure of the heirs of the donee. But the effect of the changes in the law, which culminated in the statute of *Quia Emptores*, was that the donee of land to him and his heirs acquired a fee, which would determine or escheat on failure of *his* heirs, provided it were not assigned, but would, if assigned, endure as long as there were heirs *of the assignee;* see Wms. Real Prop. 39, 40, 56, 71-75, 23rd ed. It is submitted that an estate in fee simple granted to a corporation should, since the statute of *Quia Emptores*, be treated as being subject to the same law; see Gray, Rule against Perpetuities, §§ 44-51, 44-51a, 3rd ed. And if the statute of *Quia Emptores* now prevents the existence of a possibility of reverter on the cesser of a determinable fee granted to a natural person, there seems to be no good reason why it should not have the same effect in the case of an estate in fee simple granted to a corporation. It may also be noted that, if on a grant of land to a corporation in fee it were attempted to provide by way of shifting use that if the corporation should be dissolved, the land should revert to the grantor, his heirs or assigns, the proviso would apparently be void for remoteness; see above, pp. 636-638.

(*z*) *Hastings Corpn.* v. *Letton*, Darling and Phillimore, JJ., 1908, 1 K. B. 378.

(*a*) This submission was made in the second edition of this book (p. 964); and the late Mr. Charles Sweet was of the same opinion, see his note to Challis on Real Property, 468, 3rd ed. Darling, J., simply rested his judgment on Lord Coke's doctrine as stated in 1 Black. Comm. 484. Phillimore, J., expressed the opinion that a

Re Woking Urban Council, &c. Act, 1911.

decision was followed, without any inquiry into the reasons for supporting it, by the Court of Appeal, in the case of *Re Woking Urban Council (Basingstoke Canal) Act,* 1911 (*b*), and Lord Coke's doctrine of reverter on dissolution was there applied to a grant to a corporation in fee (*b*).

Effect of dissolution on contracts.

It has been decided that contracts made by or with a corporation are discharged upon its dissolution because there is no longer any person bound by or capable of enforcing them (*c*). On this principle, it appears that debts due *from* a corporation

term of years granted to a corporation must cease to exist when the corporate *persona* is extinct, because there is then no tenant in being to continue to hold the land and (as the Court held) the term does not vest in the Crown: but he attributed this result to Lord Coke's doctrine. Apparently it did not occur to the learned judges to consider that a corporation may take a term by assignment from the lessee; in which case Lord Coke's doctrine would require that, upon the dissolution of the corporation, the term should not be extinguished, but should revert to the assignor. It is respectfully submitted, however, that, if (as the writer contends) Lord Coke's doctrine is unsound in principle and really opposed to the greater weight of authority (see above, p. 932, and notes (*u*), (*x*), (*y*)), then the fact, that on the dissolution of a corporation tenant for years there may be no person entitled to hold the land in right of the term, is no good reason why the reversion should be accelerated and the lessor entitled to re-enter. The lessor has parted with all right to the possession of the land for the whole term granted, save so far as he may by express proviso be entitled to re-enter for non-payment of rent or breach of covenant; and it is opposed to the principles of English law that he should have any claim (except as aforesaid) to enter on the land during the term. This principle is exemplified in the old law allowing the general occupant to take possession on the death of the grantee of an estate *pur autre vie,* and refusing both to the grantor and to the person entitled on the death of the *cestui que vie* any right of entry on the land; Co. Litt. 41 b; Wms. Real Prop. 20, 13th ed. (138, 23rd ed.); also in the case of a tenant for years being ousted, when the lessor has no right to re-enter till the end of the term; see *Walter* v. *Yalden,* 1902, 2 K. B. 304. For these reasons it is respectfully submitted that, on the dissolution of a corporation tenant for years, the lessor cannot lawfully re-enter, but the possession of the land is vacant and the land itself without an owner for the rest of the term. If so, it is thought that the Crown has the right (if it choose) to seize the land as *bona vacantia* for the rest of the term; see note (*e*), below.

(*b*) 1914, 1 Ch. 300, 310, 315, 320. The law laid down in *Hastings Corpn.* v. *Letton* with respect to a lease for years was also recognised, without any examination thereof, in *Re Albert Road, Norwood* (*Nos.* 56 *and* 58), 1916, 1 Ch. 289. It is again submitted that the law so laid down, without any inquiry into the reasons therefor, is erroneous; but now this contention can hardly be raised in any Court below the House of Lords.

(*c*) *Re Popular Life Assurance Co., Ltd.,* Warrington, J., 1909, 1 Ch. 80, 84; note, however, that in that case the corporation dissolved was a trustee, at the date of its dissolution, of its beneficial contracts and choses in action, having sold all its assets to another company; and cf. the case cited in note (*h*), p. 935, below.

are discharged when the corporation is dissolved, and its rights of action to recover debts due *to* it are extinguished (*d*). But the Crown has a title to take as *bona vacantia* all chattels which belonged to a dissolved corporation for its own use and have not become extinct by the fact of its dissolution; and this title extends to all chattels, whether real or personal, and whether things in possession or in action, which were vested in some other person in trust for the corporation's own use, including moneys in the hands of a third person for the use of the corporation and recoverable by some other title than the mere right to enforce an action for breach of contract (*e*). Where, however, any land or chose in action is vested in a corporation as trustee and the corporation is dissolved, it has been considered that the Court has jurisdiction under the Trustee Act, 1893 (*f*), to appoint a new trustee and make an order vesting the trust property in him; and such an order has been made with respect to a term of years vested by assignment in a corporation afterwards dissolved (*g*), and as to freeholds in fee and choses in action which belonged to such a corporation (*h*). With respect to the choses in action, this last decision seems to involve the conclusion that debts due to the corporation, as a trustee, are not discharged by its dissolution, but remain existent and capable of being vested in a new trustee (*i*); though it does not appear that the possibility of the debts having been discharged (*k*) was brought to the notice of the Court. The whole subject is full of doubt, difficulty and confusion (*l*). It may

Property vested in a corporation as trustee.

(*d*) See *Re Higginson and Dean,* Wright and Darling, JJ., 1899, 1 Q. B. 325, 330-332; Bigham, J., *Re FitzGeorge,* 1905, 1 K. B. 462, 464.

(*e*) *Re Higginson and Dean,* 1899, 1 Q. B. 325, 329, 333; *Re Henderson's Nigel Co., Ld.,* 1911, W. N. 159, 105 L. T. 370.

(*f*) Stat. 56 & 57 Vict. c. 53, ss. 25 (1), 26, 35 (1).

(*g*) *Re No.* 9, *Bomore Road,* Warrington, J., 1906, 1 Ch. 359; see above, p. 933, n. (*a*).

(*h*) *Re Ruddington Land,* Parker, J., 1909, 1 Ch. 701.

(*i*) See ibid. pp. 704, 707.

(*k*) See above, p. 934.

(*l*) See *Pryce Jones* v. *Williams,* Joyce, J., 1902, 2 Ch. 517, where it was considered that a term granted to a corporation afterwards dissolved, but apparently held by it as trustee at the time of its dissolution, vested in the Crown as *bona vacantia* (a doctrine repudiated in *Hastings Corpn.* v. *Letton,* 1908, 1 K. B. 378, 386; *Re Albert Road, Norwood* (*Nos.* 56 *and* 58), 1916, 1 Ch. 289; above, p. 933, and n. (*a*)); *Re General Accident Assce. Corpn.,* Farwell, J., 1904, 1 Ch. 147, where an order was made vesting in a trustee a mortgage term granted to a corporation afterwards dissolved and also the right to sue for the mortgage debt, the corporation having been a trustee of

be remarked that these points of law are far from academic; as companies incorporated under the Companies Acts are constantly dissolved after being wound up either voluntarily or by the Court (*m*).

Assurance of lands belonging to a company in liquidation.

The reader may be reminded that, when a company is wound up under the Companies (Consolidation) Act, 1908 (replacing the Companies Acts, 1862 to 1890), either voluntarily or by the Court, the legal estate in its lands remains vested in the company, and does not devolve upon the liquidator (*n*). The liquidator has power to *sell* all the property of the company, including its lands (*o*), and he can so transfer the beneficial interest therein to any purchaser (*n*): but he is not authorised to convey the legal estate in the company's lands (*n*). If, therefore, land belonging to a company in liquidation for any legal estate or interest be sold by the liquidator, the company must duly assure the same to the purchaser, the liquidator affixing the company's seal to the deed, as he is empowered to do (*p*). A

the mortgage, on the ground that it was a case where the trustee could not be found within sect. 26 of the Trustee Act, 1893; *Re Taylor's Agreement Trusts*, Buckley, J., 1904, 2 Ch. 737, dissenting from the decision last mentioned and expressing the opinion that the legal interest in a patent granted to a corporation and held by it as trustee vested, on its dissolution (if anywhere), in the Crown; *Re Richard Mills & Co., Ltd.*, 1905, W. N. 36, following *Re General Accident Assurance Corpn.*, ubi sup.; *Re Dutton's Patent*, 1923, W. N. 64.

(*m*) See stat. 8 Edw. VII. c. 69, ss. 172 (1), 195 (4), 242, replacing 25 & 26 Vict. c. 89, ss. 111, 143; 43 Vict. c. 19, s. 7; 63 & 64 Vict. c. 48, s. 26; and cases cited in notes (*c*), p. 934, (*d*), (*g*), (*h*), (*l*), p. 935, above. The dissolution may be declared void by the Court within two years of the date thereof; see stat. 8 Edw. VII. c. 69, s. 223; *Re Henderson's Nigel Co., Ld.*, 1911, W. N. 159, 105 L. T. 370.

(*n*) *Re Oriental, &c. Co.*, L. R. 9 Ch. 557, 560; *Re Metropolitan Bank and Jones*, 2 Ch. D. 366; *Re Ebsworth and Tidy's Contract*, 42 Ch. D. 23, 49, 52; and cases cited in notes (*c*), p. 934, (*d*), (*g*), (*h*), (*l*), p. 935, above.

(*o*) Stat. 8 Edw. VII. c. 69, ss. 151 (2 *a*), 186 (iv), replacing 25 & 26 Vict. c. 89, ss. 95, 133 (7), which applied only to voluntary liquidation, but was extended by 53 & 54 Vict. c. 63, s. 12 (2), to cases where the company was being wound up by the Court.

(*p*) Stat. 8 Edw. VII. c. 69, ss. 151 (2 *b*), 186 (iv), replacing 25 & 26 Vict. c. 89, ss. 95, 133 (7); Davidson, Prec. Conv. vol. ii. pt. i. 605, n., 4th ed.; 1 Key & Elph. Prec. Conv. 722 and n., 10th ed. Where several liquidators are appointed in a voluntary liquidation, not less than two of them can act in this respect, unless otherwise determined at the time of their appointment; stat. 8 Edw. VII. c. 69, s. 186 (vii), replacing 25 & 26 Vict. c. 89, s. 133 (6); *Re Metropolitan Bank and Jones*, 2 Ch. D. 366. If more than one liquidator is appointed in a winding up by the Court, the Court is to declare whether any act required or authorised to be done by the liquidator is to be

conveyance of such land by the liquidator alone would only pass the equitable estate therein (*q*). But if the company's estate or interest in the land were equitable only, the liquidator alone could effectually assure the same; for as we have seen (*r*), it is unnecessary for an intermediate trustee, who holds no legal estate and can have no lien for his expenses, to concur in a transfer of the beneficial interest.

Sale by company of land subject to floating security.

Upon the sale by a company of land subject to a floating security, of which the terms empower the company to dispose of its property in the course of its business until default shall be made in payment of the principal or interest secured, the purchaser is entitled to reasonable evidence that no such default has been made (*s*); and he must ascertain that no steps have been taken to enforce the security and that nothing else has occurred to make it attach definitely on the property charged (*t*).

Foreign corporations.

In modern English law, foreign corporations—that is to say, corporations created under the laws of some foreign country, which allow of the creation of corporations with the like attributes as those of English corporations—are recognised as juristic persons capable of acquiring, owning and disposing of chattels personal in England and of suing and being sued in respect thereof (*u*).

done by all or any one or more of the liquidators appointed; stat. 8 Edw. VII. c. 69, s. 149 (4).

(*q*) See cases cited in note (*n*), above, p. 936.

(*r*) Above, p. 578.

(*s*) *Re Horne and Hellard*, 29 Ch. D. 736; see *Driver* v. *Broad*, 1893, 1 Q. B. 744; *Governments Stock, &c. Co., Ltd.* v. *Manila Ry. Co., Ltd.*, 1895, 2 Ch. 551, 563, 1897, A. C. 81.

(*t*) See *Wheatley* v. *Silkstone and Haigh Moor Coal Co.*, 29 Ch. D. 715; *Government Stock, &c. Co., Ltd.* v. *Manila Ry. Co., Ltd.*, ubi sup.; *Cox Moore* v. *Peruvian Corpn., Ltd.*, 1908, 1 Ch. 604; *Evans* v. *Rival Granite Quarries, Ltd.*, 1910, 2 Ch. 979. As to the necessity for registration of floating charges, see above, p. 505, n. (*s*). Although the terms of a floating charge forbid the creation of any prior mortgage or charge, yet where money is advanced to the company to enable it to make a purchase on the terms that the lender shall have a charge on the property, the company in effect acquires only an equity of redemption, and this is all that becomes subject to the floating charge; *Re Connolly Brothers, Ld.* (*No.* 2), 1912, 2 Ch. 25.

(*u*) *Dutch West India Co.* v. *Van Moses*, 1 Str. 612; *Henriques* v. *Dutch West India Co.*, 2 Ld. Raym. 1532, 1535; *General Steam Navigation Co.* v. *Grillou*, 11 M. & W. 877, 895; *Newby* v. *Van Oppen*, L. R. 7 Q. B. 293, 294; *De Beers Consolidated Mines, Ld.* v. *Howe*, 1906, A. C. 455; *Saccharin Corpn., Ld.* v. *Fabrik von Heyden Aktiengesellschaft*, 1911, 2 K. B. 516; *The Roumanian*, 1916, 1 A. C. 124; *Daimler Co., Ld.* v. *Continental Tyre and Rubber Co., Ld.*, 1916,

And it appears that in English law such foreign corporations would now be regarded as juristic persons equally capable, as such, of *purchasing* land in England (*x*). But it is thought that a foreign corporation's capacity to *hold* land is restricted, first, by the English law contained in the Mortmain and Charitable Uses Act, 1888, with respect to the holding of land by corporations (*y*); and secondly, by the English law regulating the holding of land in England by alien persons (*z*). The first of these restrictions makes land in England belonging to a foreign corporation liable to forfeiture, unless held under a royal licence in mortmain or an Act of Parliament, or for such a short term of years as is outside the scope of the Mortmain Act of 1888 (*a*). And as regards the latter restriction, it is a question whether the British Nationality and Status of Aliens Act, 1914 (*b*), which now allows aliens to hold land in England, has any application to foreign corporations (*c*). If not, it would appear that a foreign corporation has no greater capacity to *hold* land in England than an alien natural person had at

2 A. C. 307; *Hugh Stevenson & Sons, Ld.* v. *Aktiengesellschaft für Cartonnagen Industrie,* 1918, A. C. 239; and see the articles by the author on the Capacity of Foreign Corporations to own property in England in 66 Sol. J. 70, 85, 414. A foreign corporation is not qualified to be the owner of a British ship; see stat. 57 & 58 Vict. c. 60, s. 1; 60 Sol. J. 71; Wms. Pers. Prop. 118, 17th ed.

(*x*) See *La Bourgoyne,* 1899, P. 1, 3, 5, 10, 13, 17; A. C. 431; *Bonanza Creek Gold Mining Co., Ld.* v. *R.,* 1916, 1 A. C. 566, 575, 582, 585; and the author's articles on this subject in 60 Sol. J. 85, 414.

(*y*) See 60 Sol. J. 85, 86; above, pp. 914, 915, and n. (*l*).

(*z*) Above, pp. 871, 872.

(*a*) See above, pp. 914, 915, and n. (*l*); 60 Sol. J. 85, 86, 414.

(*b*) Stat. 4 & 5 Geo. V. c. 17, s. 17, replacing the Naturalization Act, 1870, stat. 33 Vict. c. 14, s. 2; see above, pp. 871, 872.

(*c*) See 60 Sol. J. 86, 414. The Act of 1914 defines "alien" as a *person* who is not a British subject; sect. 27 (1). And by the Interpretation Act, 1889, stat. 52 & 53 Vict. c. 63, s. 19, in every Act passed after the commencement of that Act, the expression "person" shall, unless the contrary appears, include any body of persons, corporate or unincorporate. And foreign corporations are considered to be the subjects of the States in which they were created; see below, p. 939, n. (*f*). But the intention appearing in the Act of 1914 seems to be to deal with the rights of natural persons only; such persons as might be born within or without the King's dominions and allegiance, and, as might, if born without, become naturalised British subjects. The Act of 1870 appears to have had the same intention; it contained no similar clause of definition. And the Act of 1914 is mainly a consolidating Act; and sect. 17 especially is (except as to part of the proviso) a mere re-enactment in the same words of sect. 2 of the Act of 1870.

common law (*d*). It is also apprehended that a foreign corporation is further subject, in England, to any restriction imposed on its personal capacity by the law of the country of its origin. Thus, if by the law of that country its capacity for acquiring, holding or disposing of land were restricted, it is thought that it would be subject to the same restriction in England, just as if it were an English corporation similarly restricted (*e*). A foreign corporation is in the same position as an alien natural person with respect to the effect, upon its property, contracts, and rights of and liability to action, of war declared between the country of its constitution and this country (*f*).

Corporations created in the King's dominions outside England.

As a rule, corporations (including incorporated companies) created in and according to the laws of any other part of the King's dominions than England stand, in England, on the same footing as foreign corporations with respect to suing and being sued and owning property, including land (*g*). But by the Companies (Consolidation) Act, 1908 (*h*), a company incorporated in a British possession which has filed with the Registrar of Companies the documents and particulars required by that

(*d*) See 60 Sol. J. 86, 414; above, p. 871. If, however, the Crown should grant to a foreign corporation a licence in mortmain to hold land in England, it might be argued that by such grant it was impliedly constituted a corporation in England; see 60 Sol. J. 85, 414.

(*e*) See *Bonanza Creek Gold Mining Co.* v. *R.*, ubi sup.; 60 Sol. J. 70, 85, 414.

(*f*) *Janson* v. *Driefontein Consolidated Mines, Ld.*, 1902, A. C. 484, 497-499, 505, 506; *Robinson* v. *Continental Insurance Co. of Mannheim*, 1915, 1 K. B. 155; *W. L. Ingle* v. *Mannheim Insurance Corpn.*, ib. 227, 230, 231; *The Roumanian*, 1916, 1 A. C. 124; *Hugh Stevenson & Sons, Ld.* v. *Aktiengesellschaft für Cartonnagen Industrie*, 1918, A. C. 239; *Ertel, Bieber & Co.* v. *Rio Tinto Co.*, ib. 261; see above, pp. 835, 844, 872 *sq.*

(*g*) *Bateman* v. *Service*, 6 App. Cas. 386; *Logan* v. *Bank of Scotland*, 1904, 2 K. B. 495; *Actiesselskabet Dampskib "Hercules"* v. *Grand Trunk Pacific Ry.*, 1912, 1 K. B. 222; *Bonanza Creek Gold Mining Co.* v. *R.*, 1916, 1 A. C. 566; 60 Sol. J. 70, 71. But it seems that the law of England will more readily recognise the juristic personality of a corporation constituted under the law of some part of the King's dominions outside England, though such law be not English law, than it will admit that of a corporation constituted in some foreign country; see *Carron Iron Co.* v. *Maclaren*, 5 H. L. C. 415, 419, 441, 442, 444; Phillimore, J., *Clark* v. *Balm, Hill & Co.*, 1908, 1 K. B. 667, 671. And bodies corporate established under and subject to the laws of some part of the King's dominions and having their principal place of business in those dominions are qualified to own a British ship; stat. 57 & 58 Vict. c. 60, s. 1; Wms. Pers. Prop. 118, 17th ed.

(*h*) Stat. 8 Edw. VII. c. 69, s. 275.

Act in case of its establishing a place of business within the United Kingdom (*i*), has the same power to hold lands in the United Kingdom as if it were a company incorporated under that Act (*k*).

§ 8.—*Unincorporated Societies.*

Unincorporated societies.

An unincorporated society is not a juristic person capable of acquiring or holding property (*l*). And conveyances of any property for the benefit of an unincorporated society, save one established for purely charitable purposes (in the legal sense of the word *charitable* (*m*)), must be so expressed as to confine the benefit of the conveyance either to the present members of the society, or to them and to such persons as shall become members within some specified period of time allowed by the rule against perpetuities: otherwise the conveyance will be void for perpetuity (*n*). Lands belonging to unincorporated societies, as are most clubs, and as were many companies formed before the passing of the Joint Stock Companies Acts of 1844 (*o*), must therefore be vested at law either in all the present members jointly, or in trustees for them, or for them and such future members as aforesaid (*p*); and such lands are usually vested in trustees. Where title is made by or through any assurance of such lands, the conveyancer advising thereon must ascertain, first, that the legal estate has passed or will pass as required. In this respect, if the land has been vested in trustees, his task will be the same as in the case of assurances by trustees for persons not professing to have formed themselves into a society (*q*). And if no notice of the trust should appear on the abstract, he

(*i*) See sect. 274 (1).

(*k*) See sects. 16 (2), 19; above, p. 916.

(*l*) See cases cited in note (*n*), below.

(*m*) See above, p. 425 and n. (*r*); *Pease* v. *Pattinson*, 32 Ch. D. 154; *Spiller* v. *Maude*, ib. 158; *Re St. Stephen, Coleman Street*, 39 Ch. D. 492, 500, 501; *Re Stratheden and Campbell*, 1894, 3 Ch. 265.

(*n*) *Thomson* v. *Shakespear*, 1 De G., F. & J. 399; *Carne* v. *Long*, 2 De G., F. & J. 75, 79, 80; *Cocks* v. *Manners*, L. R. 12 Eq. 574, 585, 586; *Yeap Cheah Neo* v. *Ong Cheng Neo*, L. R. 6 P. C. 381, 392-395; *Re Clark's Trust*, 1 Ch. D. 497, 500; *Re Dutton*, 4 Ex. D. 54; *Re Amos*, 1891, 3 Ch. 159, 164; *Re Clarke*, 1901, 2 Ch. 110, 114; *Re Smith*, 1914, 1 Ch. 937, 948, 949; *Re Drummond*, 1914, 2 Ch. 90, 97.

(*o*) Stats. 7 & 8 Vict. cc. 110, 113; see Wms. Pers. Prop. 327-331, 17th ed.

(*p*) Co. Litt. 2a, 3a; 1 Dart, V. & P. 20, 21, 5th ed.; 24, 25, 6th ed.; 29, 30, 7th ed.

(*q*) Above, pp. 241 *sq.*

will only have to consider the matters arising on the assurance of land by joint tenants, or the survivors of them, appearing to be beneficially entitled (*r*). If, however, notice of the trust for the society appear in the title-deeds or otherwise, then (unless all the members, being *sui juris*, be parties to and execute the assurance) the conveyancer must consider whether the regulations of the society lawfully enable the act of alienation of its property to be performed by some only of the members on behalf of all of them, and if so, whether such regulations have been duly observed. Thus in the case of a members' club, of which the property is vested in trustees, it may have to be considered (for example) whether the committee or a majority of the members assembled at a general meeting (as the case may be) are authorised by the constitution of the club, as contained in the rules legally binding on the members, to dispose of the club property (*s*). So in the case of a company of the older kind, not being incorporated, it may be necessary to ascertain that any regulations empowering the directors to alienate the company's property have been strictly complied with (*t*). And in the case of the alienation of land belonging to an old building society regulated by the Building Societies Act, 1836 (*u*), or a registered friendly society (*x*), the conveyancer must satisfy himself that the rules of the society (as well as the general requirements of the regulating statutes) have been observed, or that the rules contain provisions effectually relieving any purchaser from the society's trustees from the obligation of making inquiry on this point (*y*). Unincorporated societies or associations owing their existence to statute, such as unincorporated building societies formed under the Act of 1836 (*z*), registered

Clubs.

Unincorporated companies.

Unincorporated building societies.

Friendly societies.

Unincorporated societies established under statutory powers.

(*r*) Above, pp. 224 *sq.*, 228-231.

(*s*) See *Clay* v. *Rufford*, 5 De G. & S. 768, 780; *Harington* v. *Sendall*, 1903, 1 Ch. 921; and see an article by the author, criticising this decision, in the National Review for Oct. 1903; and see further, as to club property, an article by the author in L. Q. R. xix. 386.

(*t*) See *Clay* v. *Rufford*, 5 De G. & S. 768, 780; *Re Woods and Lewis' Contract*, 1898, 1 Ch. 433, 434, 2 Ch. 211, 214, 215.

(*u*) Stat. 6 & 7 Will. IV. c. 32; see Encyclopædia of Forms, iii. 3, 4, 21 *sq.*

(*x*) The law relating to friendly societies is now consolidated in the Friendly Societies Acts, 1896 and 1908 (stats. 59 & 60 Vict. c. 25, 8 Edw. VII. c. 32), and the Collecting Societies and Industrial Assurance Companies Act, 1896 (stat. 59 & 60 Vict. c. 26).

(*y*) See Encyclopædia of Forms, vi. 15 *sq.*, 38, 51.

(*z*) *Blackburn Bdg. Socy.* v. *Cunliffe, Brooks & Co.*, 22 Ch. D. 61, 70, 9 App. Cas. 857; see above, n. (*u*).

friendly societies (*a*), literary and scientific institutions established under the Literary and Scientific Institutions Act, 1854 (*b*), or trades' unions (*c*), are subject to the same law as governs corporations created by statute for particular purposes (*d*); that is to say, they may not dispose of or use the property belonging to them in their quasi-corporate capacity in any manner, or enter into any contract for any purpose (*e*), which is extraneous to the objects for which they were instituted (*f*).

Mortgages to building, friendly or industrial and provident societies.

Effect of receipt for mortgage money endorsed on mortgage to a building society.

Here we may notice that mortgages made to building, friendly or industrial and provident societies are subject to a special law with respect to re-vesting the estate in the mortgaged land when the charge is paid off. By the Building Societies Act of 1836 (*g*), the trustees of any building society established thereunder were empowered to endorse upon any mortgage or further charge given by any member of the society to the trustees thereof for moneys advanced by the society to any member a receipt for all moneys intended to be secured by such mortgage or further charge; which receipt should be sufficient to vacate the same and vest the estate in the property comprised in such security in the person or persons for the time being entitled to the equity of redemption, without it being necessary for the trustees to give any reconveyance of the property so mortgaged. It was decided that the effect of a receipt endorsed under this enactment is to vest the estate in the mortgaged property in the person then having the best right to call for a conveyance of the same; and that a person so acquiring the legal estate in the mortgaged property is entitled to the like advantages in respect thereof as if the same had been expressly conveyed to him by some one of the ordinary modes of assurance (*h*). Where

(*a*) See *Re Coltman*, 19 Ch. D. 64; above, p. 941, n. (*x*).
(*b*) Stat. 17 & 18 Vict. c. 112; *Re Badger*, 1905, 1 Ch. 568.
(*c*) *Amalgamated Society of Railway Servants* v. *Osborne*, 1910, A. C. 87, 92, 94.
(*d*) Above, pp. 921-923.
(*e*) *Re Birkbeck Perm. Benefit Bdg. Socy.*, 1912, 2 Ch. 183; varied in D. P. nom. *Sinclair* v. *Brougham*, 1914, A. C. 398.
(*f*) See cases cited above, notes (*z*), (*a*), (*b*), (*c*).
(*g*) Stat. 6 & 7 Will. IV. c. 32, s. 5.
(*h*) *Hosking* v. *Smith*, 13 App. Cas. 582, 585, 589, adopting on the first point the second of the two alternative constructions propounded by Cairns, C., in *Pease* v. *Jackson*, L. R. 3 Ch. 576, 582, but overruling on the second point that case and *Robinson* v. *Trevor*, 12 Q. B. D. 423.

Hosking v. *Smith.*

therefore a member mortgaged his land to a building society, then made a second mortgage to another person, and afterwards arranged with a third party to pay off the first mortgage and make a further advance, it was held that on a receipt being endorsed on the first mortgage for the moneys due thereunder the legal estate in the land thereby mortgaged vested in the third party; and further that he (having had no notice of the second mortgage) was in consequence entitled to tack his further advance to the amount expended in paying off the first mortgagee, and to have priority over the second mortgagee in respect of the whole amount owing to him (*i*).

Building Societies Act, 1874.

By the Building Societies Act, 1874 (*j*), when all moneys intended to be secured by any mortgage or further charge given to a society under that Act in England or Ireland have been fully paid or discharged, the society may endorse upon or annex to such mortgage or further charge a reconveyance of the mortgaged property to the then owner of the equity of redemption, or to such persons and to such uses as he may direct (*k*), or a

(*i*) *Hosking* v. *Smith,* ubi sup., overruling on the second point *Pease* v. *Jackson* and *Robinson* v. *Trevor,* ubi sup.

(*j*) Stat. 37 & 38 Vict. c. 42, s. 42, providing also, in cases where the mortgage or further charge has been registered under any Act for the registration or record of deeds or titles, or (being of copyholds or lands of customary tenure) has been entered on any court rolls, for the entry, on production of the statutory receipt, of satisfaction of the mortgage or charge, and for granting a certificate to that effect. By the Land Transfer Rules, 1903-1908, No. 167, when all moneys intended to be secured by any mortgage or charge to or in favour of any building society, friendly society (including a branch society), or industrial and provident society, have been fully paid or satisfied, an instrument of discharge in the form provided by these rules, under the seal of such society if incorporated, or under the hands and seals of the trustees for the time being of or acting in that matter for such building or friendly society, or other the proper officers thereof, if such society is not incorporated, and attested by the secretary; or under the hands and seals of two members of the committee of an industrial and provident society, if unincorporated, and attested by the secretary; shall have the same effect and operation in vacating the mortgage or charge, and in vesting the estate, and otherwise, as a receipt indorsed on such mortgage or charge, duly made, signed, and attested in such form and manner and by such persons as is prescribed by, and otherwise in conformity with the provisions of s. 5 of 6 & 7 Will. IV. c. 32; s. 42 of the Building Societies Act, 1874; s. 43 of the Industrial and Provident Societies Act, 1893; and s. 53 of the Friendly Societies Act, 1896, respectively.

(*k*) No particular effect is given by this enactment to the reconveyance here mentioned; and if, on payment off of such a mortgage or further charge as above mentioned, a reconveyance is used (instead of a statutory receipt) it takes effect according to the general law;

receipt under the seal of the society, countersigned by the secretary or manager in the form specified in the Schedule to the Act; and such receipt shall vacate the mortgage or further charge or debt, and vest the estate in the property therein comprised in the person for the time being entitled to the equity of redemption, without any reconveyance or re-surrender whatever. The construction placed on this enactment is exactly similar to that placed on the enactment of 1836; and it is established that the effect of the statutory receipt is to vest the estate in the person having the best right to call for it, and that a person so acquiring the legal estate obtains all the attendant advantages (*l*). Thus a person paying off a first mortgage to a building society and making a further advance, without notice of a previous second mortgage, will by virtue of the statutory receipt being then endorsed on the first mortgage obtain the legal estate in the mortgaged property and consequent priority over the second mortgagee both for the amount expended in paying off the first mortgage and for his further advance (*m*). Where a person, who has mortgaged his land, first to a building society and afterwards to another, pays off the first mortgage out of his own money and so obtains the statutory receipt from the society, the legal estate vests in the second mortgagee, though he be unaware of the discharge of the first mortgage (*n*). Where a mortgagor of land to a building society arranged with a bank to pay off the mortgage, and the bank advanced the money on receiving from the society all the title deeds (except the mortgage) and an undertaking to endorse the statutory receipt and from the mortgagor a memorandum of equitable charge on the land, including an undertaking to execute a legal mortgage if required, and shortly afterwards the society handed the mortgage deed with the statutory receipt endorsed to the bank, it was held that the legal estate then vested in the bank. And the

Crosbie-Hill v. Sayer.

Carlisle Banking Co. v. *Thompson,* 28 Ch. D. 398. Both the statutory reconveyance and the statutory receipt are under sect. 41 of the Act exempt from stamp duty; *Old Battersea, &c. Building Society* v. *Inland Revenue Commissioners,* 1898, 2 Q. B. 294.

(*l*) *Fourth City, &c. Building Society* v. *Williams,* 14 Ch. D. 140; *Sangster* v. *Cochrane,* 28 Ch. D. 298; *Crosbie-Hill* v. *Sayer,* 1908, 1 Ch. 866, 873, 874.

(*m*) *Marson* v. *Cox,* 14 Ch. D. 140, as confirmed by *Hosking* v. *Smith,* 13 App. Cas. 582; *Sangster* v. *Cochrane,* 28 Ch. D. 298, where the intermediate transaction was an absolute sale, not a second mortgage.

(*n*) *Fourth City, &c. Building Society* v. *Williams,* 14 Ch. D. 140.

mortgagor having subsequently made a mortgage to L. and then arranged with C. to pay off the bank, and C. having done so (without notice of the mortgage to L.) and having received from the bank the title deeds and the bank's memorandum of charge with a receipt endorsed for all moneys due thereunder, it was further decided that C. had then the best right to call for the legal estate (which remained vested in the bank) and was so entitled to priority over L. (*o*). The Friendly Societies Act, 1896 (*p*), and the Industrial and Provident Societies Act, 1893 (*q*), contain provisions similar to those of the Building Societies Act, 1874 (*r*), with respect to the vacation of mortgages to such societies by a statutory receipt endorsed thereon or annexed thereto (*s*).

Mortgages to friendly societies and industrial and provident societies.

Doubt has been cast on the validity of a transfer, without the mortgagor's consent, of a mortgage made to a building society by a member to secure the repayment of money lent by way of an advanced share in the society (*t*). But it has been held that where a mortgage to a building society expressly contemplates the case of the assignment of the security, as by giving powers to or imposing duties on the society *and its assigns*, the

Transfer of mortgage made to a building society.

(*o*) *Crosbie-Hill* v. *Sayer*, 1908, 1 Ch. 866.

(*p*) Stat. 59 & 60 Vict. c. 25, s. 53, replacing 38 & 39 Vict. c. 60 (the Friendly Societies Act, 1875), s. 16 (7, 8); see *Carlisle Banking Co.* v. *Thompson*, 28 Ch. D. 398, 400.

(*q*) Stat. 56 & 57 Vict. c. 39, s. 43, replacing 39 & 40 Vict. c. 45, s. 12 (8); 34 & 35 Vict. c. 80, s. 3.

(*r*) Stat. 37 & 38 Vict. c. 42, s. 42; above, p. 943.

(*s*) By the Small Dwellings Acquisition Act, 1899, as extended by Part III. of the Housing, Town Planning, &c. Act, 1919, local authorities are empowered to advance money to a resident in any house within their area, the market value of which does not exceed 800*l.*, for the purpose of enabling him to acquire the ownership of the house. On payment off of money advanced under this power and secured by mortgage, a receipt under seal by the local authority in the form prescribed by the Act of 1919 operates to discharge the mortgage, and also as a conveyance or reconveyance of the land to the person who immediately before the execution of the receipt was entitled to the equity of redemption. See stats. 62 & 63 Vict. c. 44; 9 & 10 Geo. V. c. 35, s. 49, and Fourth Sched. Pt. I. and Pt. II., which states the effect of the endorsed receipt. Provision is made for the case where the money is paid by a person who is not immediately entitled to the equity of redemption, and also disabling the mortgagor from keeping alive the mortgage as against a subsequent incumbrancer.

Receipt discharging mortgage under Small Dwellings Acquisition Act, 1899.

(*t*) *Re Rumney and Smith*, 1897, 2 Ch. 351, attributing the decision in *Ulster Permanent Bdg. Socy.* v. *Glenton*, 21 L. R. Ir. 124, to the fact that the mortgagor consented to the transfer. And see *Sun Bdg. Socy.* v. *Western Suburban, &c. Bdg. Socy.*, 1921, 2 Ch. 438, reversing *S. C.*, 1921, 2 Ch. 83.

mortgage may well be transferred without the concurrence of the mortgagor (*u*).

Vesting of property of unincorporated building or friendly societies.

All freehold and leasehold property belonging to any unincorporated building society certified under the Act of 1836 (*x*) or to any registered friendly society (*y*) vests, without any conveyance, in the trustees for the time being thereof (*z*).

(*u*) *Sun Bdg. Socy.* v. *Western Suburban, &c. Bdg. Socy.*, 1920, 2 Ch. 144, 157 (*semble,* not disapproved of in C. A., *S. C.*, 1921, 2 Ch. 438).

(*x*) Stats. 6 & 7 Will. IV. c. 32, s. 4, applying 10 Geo. IV. c. 56, s. 21; 37 & 38 Vict. c. 42, s. 7. See stats. 37 & 38 Vict. c. 42, s. 27; 40 & 41 Vict. c. 63, ss. 3, 45, as to the vesting of the property of such a society on its incorporation, and on the union of or the transfer of its assets by one building society with or to another.

(*y*) See stat. 59 & 60 Vict. c. 25, ss. 48-50, replacing 38 & 39 Vict. c. 60, s. 16 (3-6); 18 & 19 Vict. c. 63, s. 18; 13 & 14 Vict. c. 115, s. 13; 10 Geo. IV. c. 56, s. 21.

(*z*) See also stat. 56 & 57 Vict. c. 39, ss. 21, 53, as to the vesting of property held in trust for or belonging to an industrial and provident society upon its registration or on the amalgamation of two or more such societies.

CHAPTER XVII.

OF RELATIVE DISABILITY IN EQUITY.

In the previous chapter we examined the instances in which a contract for the sale of land may be voidable or void at law on account of the legal incapacity of some party thereto to bind himself or herself by such a contract as was purported to be made. It is now proposed to treat of the cases where a sale of land may be voidable in equity because one of the parties stands, either towards the other or towards the beneficial owners of the land or the purchase money, in some relation imposing on him either a conditional or an absolute disability to take under the contract. This kind of relative disability is of a different nature from personal incapacity, strictly so called: but it may conveniently be considered, as a ground for impeaching the validity of the contract, in connexion therewith.

Relative disability in equity.

The cases in which this kind of disability may arise may be grouped into three classes:—First, where there is such a confidential relation between the parties to the sale that the presumption of undue influence arises in respect of all contractual dealings between them. Here the person occupying the position of influence is under a conditional disability to take advantage of the sale. Secondly, where one of the parties stands in a fiduciary relation to the other party to the sale as regards the particular property dealt with. Here also the disability is only conditional. And thirdly, where one of the parties stands, not towards the other party to the sale, but towards the beneficial owners of the land or money dealt with, in the relation of agent executing an authority to sell or purchase; in which case he is under an absolute disability to take under the contract, either directly or indirectly, in the opposite capacity of purchaser or vendor.

Three classes of relative disability.
1. Where there is a confidential relation raising the presumption of undue influence.
2. Where there is a fiduciary relation between the parties as regards the property dealt with.
3. Where one of the parties is acting under an authority to sell or purchase.

Confidential relation raising the presumption of undue influence.

The first of these classes has already been examined under the head of Undue Influence (*a*). The reader will remember that a sale of land may be voidable in equity on the ground that one of the parties thereto exercised undue influence over the other; and that undue influence may be alleged either independently or not of the existence of a confidential relation between the parties, which invested the one with a peculiar authority over the other or imposed on him a special duty of advising the other. In the former case the plaintiff claiming to avoid the transaction must give positive proof of the undue influence alleged. In the latter he need only prove the existence of the confidential relation, and it will then be presumed, until the contrary be shown, that the defendant took advantage of his situation; and the *onus* lies on him of proving that the other was not unduly influenced, and gave a perfectly free consent to the contract. In these cases, however, the contract is not avoided unless the alleged undue influence be established, either by positive proof, or by proof of the existence of a confidential relation and failure to rebut the ensuing presumption. And the obligations arising out of the confidential relation do not impose on the party affected thereby an absolute incapacity in equity of contracting with the other. On the contrary, he may so contract; though, if he do, he is saddled with the burthen of showing that he did not use his influence to the other's disadvantage. His position is in fact analogous to that of a party to a contract *uberrimæ fidei* (*b*). The agreement is not impeachable for want of contractual capacity, strictly so called, on the part of the person charged to refrain from undue influence, but it is voidable in case of his failure to prove that he discharged the duties incident to his position; and these include the obligation of making full disclosure of all circumstances, within his knowledge, which affect the value of the property bought or sold (*c*). At the same time, although confidential relations, which give rise to the presumption of undue influence, do not involve the *absolute* incapacity of the person occupying the position of influence to contract with the other, they affect not only all contractual dealings between the parties with respect to any property of either of them, but also all gifts made between them whilst living in favour of such person (*d*). It

(*a*) Above, p. 820.
(*b*) Above, pp. 757, 790, 791.
(*c*) Above, pp. 823-825.
(*d*) Above, p. 823.

seems, therefore, correct to say that he is subject in equity to a kind of *general* disability as regards the other party; though this disability is not absolute, but only conditional, and is removed on performance of the condition. This class of disability is exemplified in the case of solicitor and client, guardian and ward, parent and child: but the reader will not forget that it is not confined to any particular set of relations, but will arise whenever it is proved that one person stands toward another in any relation, of which the natural consequence would be that the other would come under his influence (*e*). We need not further discuss this class of disability, which has been fully dealt with above (*f*).

Solicitor and client; guardian and ward; parent and child.

The second class of cases above referred to (*g*), which is in effect limited to the purchase by a trustee of his *cestui-que-trust's* interest in the trust property, has been already mentioned incidentally in connexion with the subject of undue influence (*h*): but it does not depend on the same principles exactly as are applicable in the case of undue influence itself. The mere fact that one man is trustee of some property for another does not of itself alone raise the presumption that he exercised undue influence in *all* his contractual dealings with the other, or affect the validity of their contracts relating to other property (*i*). It is true that, owing to incidental circumstances, a trustee may stand towards his *cestui-que-trust* in such a confidential relation as to raise the presumption of his undue influence in all dealings between them; thus a man may be trustee acting as guardian for an infant (*k*), or trustee acting as business manager or adviser for a young man or a woman or a man unversed in business affairs. In such cases a confidential relation is no doubt established, and the trustee is subject in equity to the consequent general disability (*l*); but this consequence follows, not merely because the one is trustee for the other, but because the incidental circumstances attending the particular case cause the position of trustee to be a position of influence over the

Where one party is trustee for the other of the property sold.

(*e*) Above, p. 822.
(*f*) Pp. 820-831.
(*g*) Above, p. 947.
(*h*) Above, pp. 824, 825, 831.
(*i*) See note (*m*), below, p. 950.
(*k*) *Hylton* v. *Hylton*, 2 Ves. sen. 547.
(*l*) Above, p. 949.

Gifts by *cestui-que-trust* to the trustee by way of bounty for his services.

other (*m*). It appears, indeed, that gifts made by a *cestui-que-trust* to his trustee by way of bounty or remuneration for the trustee's services, which he is bound to render without deriving any profit for himself, stand on the same footing as gifts to a solicitor from his client or to a guardian from his ward (*n*); and to this extent the trustee seems to labour under a general disability not confined to his acceptance of a present of part of the trust property. But, notwithstanding the result of the fiduciary relation, it does not appear to impose on the trustee any *general* disability as regards *contractual* dealings with his *cestui-que-trust;* and there seems to be no reason to suppose that, where they enter into a contract relating to some matter entirely independent of the trust estate, the trustee is under the obligation of proving the fairness of the transaction and the other's free consent, unless the *cestui-que-trust* can establish that, in the circumstances of the case, the trusteeship placed the trustee in a position of influence over him (*o*). With respect to matters of contract as opposed to gift, the relation of trustee and *cestui-que-trust* appears to subject the trustee to no more than a particular conditional disability affecting only their contracts dealing with the *cestui-que-trust's* interest in the trust property.

Purchase by a trustee of the *cestui-que-trust's* interest in the trust property.

The law relating to contracts of this kind is as follows:—A trustee is at liberty to purchase from his *cestui-que-trust* either the whole or any part of the latter's interest in the trust estate;

(*m*) Consider the judgment in *Hylton* v. *Hylton,* 2 Ves. sen. 547, 548, 549. "The defendant appears to stand in the place, *not of a common trustee barely of a particular estate,* but of a trustee acting in fact as guardian for the minor, his nephew, and taking care of his person and his estate; so that the condition of these persons, the plaintiff and the defendant, comes within this rule" (*i.e.*, of guardian and ward). It is submitted that the *dicta* of Brougham, C., in *Hunter* v. *Atkins,* 3 My. & K. 113, 135, 136, 140, with respect to bargains between trustee and *cestui-que-trust,* are too widely expressed, and must be limited (where not confined to bargains dealing with the trust property) to a trustee occupying in fact a position of influence. Take for example the case of two men contracting with each other in the course of their business. One happens to be a trustee of the other's marriage settlement comprising property in no way connected with his trade. It could not be contended that on proof of this fact alone their business contract would be voidable unless the trustee could establish the fairness of the bargain.

(*n*) *Hatch* v. *Hatch,* 9 Ves. 292, 296, 297; *Vaughton* v. *Noble,* 30 Beav. 34, 39; *Barrett* v. *Hartley,* L. R. 2 Eq. 789; *Wright* v. *Carter,* 1903, 1 Ch. 27, 40, 49, 56, 57; *Re Coomber,* 1911, 1 Ch. 174, 723; see above, pp. 821, 822.

(*o*) Above, note (*m*).

and this is equally the case where the trustee is a trustee for sale (*p*). But as his duty as trustee is to make the most of the trust property for the other's benefit, and his position as trustee gives him the best opportunity of becoming acquainted with its true value, he is subject, on contracting to purchase the property himself, to the like obligation as is incumbent on a solicitor buying from his client (*q*). He is bound to take no undue advantage of the vendor and to disclose every circumstance known to him that may affect the value of the property (*r*). The sale is voidable at the vendor's option in case the trustee fail to discharge this obligation; and more than that, in any proceedings to set aside the contract, the vendor need only show that the other party was a trustee for him and bought the trust property from him, and the *onus* will then lie upon the trustee of proving the fairness of the bargain and of his conduct (*s*). It is said that, to enable a trustee to buy the trust property from his *cestui-que-trust,* the relation between them must be dissolved, and they must assume the position of independent bargainers (*t*). But this means that it is for the trustee to show, by proving the fairness of the transaction, that they did really occupy this position (*t*). It does not mean that a release from the trust will absolve the trustee from the obligation incumbent on him in case he afterwards purchase the trust property. As we have seen (*u*), if, while acting as trustee, he obtain information affecting the value of the trust property, and he retire from the trust and afterwards purchase the trust property from the beneficial owners, the sale is voidable by them in case he do not disclose the information so acquired. In all other respects purchases by a trustee of his *cestui-que-trust's* interest in the trust property are governed by the same rules as are applicable to a purchase by a solicitor from his client; and

(*p*) *Gibson* v. *Jeyes,* 6 Ves. 266, 270, 271, 277; *Expte. Lacey,* ib. 625, 626 (the rule is "not that a trustee cannot buy from his *cestui-que-trust,* but that he shall not buy from himself," see below, p. 954); *Coles* v. *Trecothick,* 9 Ves. 234, 244, 246, 248; *Franks* v. *Bollans,* L. R. 3 Ch. 717, 718, 719.

(*q*) See previous note.

(*r*) Above, pp. 824, 825.

(*s*) *Denton* v. *Donner,* 23 Beav. 285, 290; *Luff* v. *Lord,* 34 Beav. 220, 227; Cairns, C., *Thomson* v. *Eastwood,* 2 App. Cas. 215, 236; *Plowright* v. *Lambert,* 52 L. T. 646; *Dougan* v. *Macpherson,* 1902, A. C. 197.

(*t*) See cases cited above, note (*p*).

(*u*) Above, p. 825.

it seems unnecessary to repeat here what has been already said concerning such purchases (*x*). It will not be forgotten that where such a purchase is set aside for the trustee's concealment of information, which he ought to have imparted, he will be required to account for the rents and profits received by him since the sale on the footing of wilful default (*y*).

The rule governs all contracts giving the trustee any interest in the trust property.

Sale by a trustee for purchase to his *cestui-que-trusts*.

Gifts to trustee by *cestui-que-trust* of the trust property.

All contractual dealings, of whatever kind, between a trustee and his *cestui-que-trust*, for the acquisition by the former of the trust estate, or any interest therein, are subject to the same rules as govern the case of sale (*z*). Thus these rules are applicable where a trustee for purchase, who is (as we shall see (*a*)) prohibited from buying his own property in exercise of the trust, sells the same to his *cestui-que-trusts* who pay the price with the trust money. The law as to gifts by a *cestui-que-trust* to his trustee of any interest in the trust property has been already stated (*b*). The principles regulating purchases of the trust property by a trustee from his *cestui-que-trust* apply in every case where one stands in a fiduciary relation to another as regards some particular land, being bound to make the most of it for the other's advantage, and he purchases it himself from the other; as for instance, where an agent for sale of land, or an agent or a steward entrusted with the management of land, buys it openly from his principal (*c*). Where such an agent secretly buys the land, with which he is so entrusted, taking a conveyance thereof in the name of another, or otherwise conceals from the principal any interest which he has in the purchase, the transaction is really a sale effected by the agent to himself, falls within the third class of cases above mentioned (*d*), and is voidable at the principal's option on mere proof of the facts, whether the terms of the bargain were fair or advantageous to the principal or not (*e*). The same rules apply, according to

Agent purchasing his principal's lands.

(*x*) See above, pp. 821-825, 829-831; *Morse* v. *Royal*, 12 Ves. 335; *Baker* v. *Read*, 18 Beav. 398; *Smedley* v. *Varley*, 23 Beav. 358.
(*y*) Above, p. 831, and n. (*u*).
(*z*) *Turnbull* v. *Duval*, 1902, A. C. 429.
(*a*) Below, p. 954.
(*b*) Above, p. 950.
(*c*) Above, p. 824 and notes (*m*), (*n*), (*o*).
(*d*) Above, p. 947.
(*e*) See *Hardwicke* v. *Vernon*, 4 Ves. 411; *Charter* v. *Trevelyan*, 11 Cl. & Fin. 714, 732, but it is conceived that the statement there made, that an agent for sale secretly purchasing himself can uphold the transaction by proving that full value was given, is erroneous

the circumstances of the case, where an agent for purchase openly sells his own land to his principal or secretly buys it for his principal in attempted exercise of his authority (*f*).

Purchase by managing partner of another partner's share.

Here it may be mentioned that, where a partnership business is so managed by one partner that he alone is directly informed as to the extent and value of the assets of the firm, a purchase by him of any other partner's share in the partnership property is a contract *uberrimæ fidei* (*g*) and is voidable for mere non-disclosure by him of any fact material to the value of the property sold. This rule arises out of the duty of every partner to disclose to the others all information possessed by him concerning the assets and business of the firm (*h*). The case is analogous to that of a trustee purchasing his *cestui-que-trust's* interest in the trust property: but it is not the same. Thus it is thought that, where a trustee has bought the trust property from his *cestui-que-trust,* the sale would be voidable for non-disclosure as against a subsequent purchaser from the trustee with notice that the parties to the original sale stood in the relation of trustee and *cestui-que-trust* (*i*). Partners, however, are not under any general equitable disability with regard to the purchase of each other's shares in the partnership; and it is conceived that they must be presumed to be all equally well informed concerning the assets of the firm. It is thought, therefore, that a sale by one partner to another of his share in the partnership would not be voidable as against a sub-purchaser for value, unless the latter had notice, not merely of the partnership relation, but also of the fact that the vendor partner occupied such a position in the management of the partnership

Purchase by trustee from *cestui-que-trust* voidable against sub-purchaser with notice of the parties' relation.

(1 Dart, V. & P. 40, n. (*i*), 6th ed.; 39, n. (*e*), 7th ed.); *Re Bloye's Trusts,* 1 Mac. & G. 488, 494; *S. C.,* nom. *Lewis* v. *Hillman,* 3 H. L. C. 607, 628-630; *Dunne* v. *English,* L. R. 18 Eq. 524; *McPherson* v. *Watt,* 3 App. Cas. 254, 263, 264.

(*f*) See the two previous notes, and cases as to purchase cited below, p. 954, n. (*l*).

(*g*) Above, pp. 757, 791.

(*h*) *Maddeford* v. *Austwick,* 1 Sim. 89, 93; *Re Law,* 1905, 1 Ch. 140.

(*i*) It is conceived that this case is exactly parallel to that of a purchase by a solicitor from his client, and that, as the *onus* of upholding the transaction lies on the trustee after mere proof of the relation between the parties, a purchaser from the trustee with notice of that relation is subject to the same burthen; see above, pp. 824, n. (*q*), 951; *Spencer* v. *Topham,* 22 Beav. 573. It is submitted that the suggestion in Sug. V. & P. 695, that the subsequent purchaser must also have notice of the circumstances rendering the sale voidable, cannot be supported.

business as placed him in sole possession or direct control of the information relating to the extent and value of the assets of the firm.

Rule where one party to the sale is executing an authority.

Reduced to its lowest terms, the rule governing the third class of cases above referred to (*k*) may perhaps be stated in this way:—Where a man's title to sell or buy some particular piece of land is derived, not from his own beneficial ownership of the land or the money to be employed in the purchase, but from an *authority* in that behalf given to him either by the act of the beneficial owner of the land or money or by statute on such owner's behalf, then he cannot well exercise the authority by selling to or buying from himself, either directly or indirectly; unless the instrument or statute conferring the authority otherwise provide (*l*). And if such instrument or statute allow of no exception in his favour, and in the transaction in which he purports to exercise such an authority to sell or buy he be himself the purchaser or the vendor, either directly or through the mediation of an agent, trustee or nominee for himself, or even (in the case of sale) by sub-purchase from a stranger (*m*), the sale or purchase is voidable in equity at the instance of the beneficial owner of the land sold or money paid in purchase (*n*). The transaction is, moreover, so voidable on the mere proof that the vendor or purchaser was acting in exercise of such an authority and in effect sold to or bought from himself; and it is immaterial whether the terms of the bargain so purported to be made were otherwise fair or were actually advantageous to the parties who seek to set it aside (*o*).

(*k*) Above, p. 947.

(*l*) As to an authority to sell, see *Expte. Lacey*, 6 Ves. 625; *Lister* v. *Lister*, ib. 631; *Lewis* v. *Hillman*, 3 H. L. C. 607, 628-630; *Franks* v. *Bollans*, L. R. 3 Ch. 717, 718, 719; *De Bussche* v. *Alt*, 8 Ch. D. 286; *Farrar* v. *Farrars, Ld.*, 40 Ch. D. 395, 404, 409; *Re Douglas and Powell's Contract*, 1902, 2 Ch. 296; *Boyce* v. *Edbrooke*, 1903, 1 Ch. 836, 843 *sq.*; *Hodson* v. *Deans*, 1903, 2 Ch. 647, 652, 653. As to an authority to purchase, see Lewin on Trusts, 439, 6th ed.; 590, 12th ed.; *Sharman* v. *Brandt*, L. R. 6 Q. B. 720, 723; *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, 1229, 1236, 1260; *Re Cape Breton Co.*, 29 Ch. D. 795, 803, 811; *North American Land and Timber Co., Ld.* v. *Watkins*, 1904, 1 Ch. 242, 248; *Armstrong* v. *Jackson*, 1917, 2 K. B. 822.

(*m*) *Parker* v. *McKenna*, L. R. 10 Ch. 96, 125, 126; *Williams* v. *Scott*, 1900, A. C. 499; *Delves* v. *Gray*, 1902, 2 Ch. 606; see below, p. 957.

(*n*) See n. (*l*), above; *Sanderson* v. *Walker*, 13 Ves. 601.

(*o*) *Expte. James*, 8 Ves. 337, 348; *Re Bloye's Trusts*, 1 Mac. & G. 488, 491; *Aberdeen Ry. Co.* v. *Blaikie*, 1 Macq. 461, 471.

Principle of the rule.

With regard to the principle on which this rule is founded, we must remark first, that the person invested with such an authority may either stand in a fiduciary relation to the beneficial owner of the property or he may not. In the former case the grounds which may be alleged for the rule are obvious: namely, that the trustee, having every opportunity to find out the true value of the property and being bound to exercise the authority to the best advantage of the beneficial owner, shall not place himself in a position where his interest is in conflict with his duty (*p*); also, that a trustee shall make no profit by his trust. These reasons are certainly applicable, for instance, in the case of a trustee for sale of land, and would alone be sufficient to prohibit him from buying the property himself. The rule extends, however, to cases in which the authority is conferred for the sole benefit of the person to whom it is given (*q*). Thus, we have seen (*r*) that it applies to a mortgagee selling the mortgaged property under the power of sale expressly contained or implied by statute in the mortgage deed; notwithstanding that in exercising such a power, a mortgagee is held not to be a trustee for the mortgagor, nor to be bound to sell to the mortgagor's best advantage (*s*). In this case, therefore, we are driven to find other grounds for the rule (*t*); and it

(*p*) See *Expte. Lacey,* 6 Ves. 625; *Lister* v. *Lister,* ib. 631; *Expte. James,* 8 Ves. 337, 348; *Re Bloye's Trusts,* 1 Mac. & G. 488, 495; *Aberdeen Ry. Co.* v. *Blaikie,* 1 Macq. 461; *Boyce* v. *Edbrooke,* 1903, 1 Ch. 836, 843. This principle is so rigidly upheld that a receiver appointed by the Court is prohibited from buying without leave of the Court the property, of which he is receiver, even where the sale is made, not in the action in which he was appointed, but by a mortgagee selling with leave, outside that action; *Nugent* v. *Nugent,* 1908, 1 Ch. 546.

(*q*) *Re Bloye's Trusts,* 1 Mac. & G. 488, 494; *S. C.,* nom. *Lewis* v. *Hillman,* 3 H. L. C. 607, 628-630.

(*r*) Above, p. 320.

(*s*) *Warner* v. *Jacob,* 20 Ch. D. 220, 224; *Farrar* v. *Farrars, Ld.,* 40 Ch. D. 395, 411; *Kennedy* v. *De Trafford,* 1897, A. C. 180, 185, 192; *Nutt* v. *Easton,* 1899, 1 Ch. 873, 877, 878; *Haddington Island Quarry Co., Ld.* v. *Huson,* 1911, A. C. 722, 729; above, pp. 320, 321.

(*t*) It should be noted that the application of the rule to the case of a mortgagee, or a person in the like position, exercising his power of sale, was originally put on the ground of his being a trustee in the exercise of such power and of the consequent conflict between his interest and his duty; *Downes* v. *Grazebrook,* 3 Mer. 200, 207-209; *Re Bloye's Trusts,* 1 Mac. & G. 488, 494, 495; *Robertson* v. *Norris,* 1 Giff. 421, 4 Jur. N. S. 155, 443. The true reason of the rule, namely, that a sale by the seller to himself is no sale at all, and is therefore no proper exercise of the authority, was first clearly expounded by Lord St. Leonards, C., in *Lewis* v. *Hillman,* 3 H. L. C. 607, 628-630. And

appears to rest at bottom on the principle that an *authority* given must be strictly pursued (*u*). Where a man is invested with an authority to sell or buy, the mandate is that he shall enter into a *contract* of sale or purchase; that is, a transaction implying a bargain between the person authorised and some *other* person acting independently of him (*x*), the result of which is, that each incurs obligations to the other (*y*). Now, at law, a man cannot make a contract with himself, either alone or jointly with others; if he purport to do so, the transaction is absolutely void as regards him (*z*). It is impossible, therefore, for a man to sell to or purchase from himself at law. But at law he may well contract with any other person than himself; and if that other be bound in equity, under trust, to give him the benefit of the transaction, the trust is a matter of which the common law takes no cognizance (*a*). In equity, however, the substance of the transaction is regarded; and if a man exercising an authority to sell or purchase in effect sell to or buy from himself, the transaction is not considered to be a *sale* at all, and is therefore an improper exercise of the authority (*b*). And for this reason the sale so purported to be made is voidable in equity at the instance of those by or on whose behalf the authority was conferred (*c*).

Examples of the rule: Trustee for sale.

The above-mentioned rule may be illustrated by the following examples:—First, a trustee for sale, whether he derive his

afterwards, the view that a mortgagee exercising his power of sale was in the position of a trustee was repudiated; see previous note.

(*u*) Above, pp. 251-254, 276, 281, 320, 321.

(*x*) See *Lewis* v. *Hillman*, 3 H. L. C. 607, 628-630; *Franks* v. *Bollans*, L. R. 3 Ch. 717, 719; *Farrar* v. *Farrars, Ld.*, 40 Ch. D. 395, 404, 410; *Moore, Nettlefold & Co.* v. *Singer Manufacturing Co.*, 1904, 1 K. B. 820.

(*y*) Above, pp. 1, 251.

(*z*) *Mainwaring* v. *Newman*, 2 B. & P. 120; *Faulkner* v. *Lowe*, 2 Ex. 595; *Boyce* v. *Edbrooke*, 1903, 1 Ch. 836; *Re George Routledge & Sons, Ld.*, 1904, 2 Ch. 474; *Re W. Tasker & Sons, Ld.*, 1905, 2 Ch. 587; *Ellis* v. *Kerr*, 1910, 1 Ch. 529; *Napier* v. *Williams*, 1911, 1 Ch. 361.

(*a*) *Boyce* v. *Edbrooke*, 1903, 1 Ch. 836, 845; Wms. Real Prop. 174, 23rd ed.

(*b*) *Sanderson* v. *Walker*, 13 Ves. 601; *Re Bloye's Trusts*, 1 Mac. & G. 488; *S. C.*, nom. *Lewis* v. *Hillman*, 3 H. L. C. 607, 628-630; *Farrar* v. *Farrars, Ld.*, 40 Ch. D. 395, 409; *Re Douglas and Powell's Contract*, 1902, 2 Ch. 296; *Hodson* v. *Deans*, 1903, 2 Ch. 647, 652; above, p. 954, n. (*l*).

(*c*) Above, p. 954, n. (*l*).

authority from a trust for or power of sale (*d*), cannot purchase the trust property, either directly or indirectly, from himself if he be sole trustee, or from the other trustees and himself if he have co-trustees (*e*), or from his co-trustees or co-trustee alone (*f*). And an attempted sale of this kind is equally voidable in equity, whether it be made by public auction or private contract (*g*), to the trustee directly or to another person purchasing on his behalf (*h*), or be effected by his retiring from the trust for the purpose (*i*). If, however, a trustee for sale retire from the trust and some time afterwards purchase the trust property from the then existing trustees, the interval being so great that he could not possibly have retired in contemplation of such purchase, the transaction is free from the objection of its being a sale by a trustee to himself (*k*): though the sale would, it is thought, be voidable in case of the purchaser's concealment of any information acquired by him as trustee and affecting the value of the property (*l*). If trustees for sale in good faith sell the trust property to a stranger acting quite independently of them, none of them is at liberty to purchase the whole or part of the stranger's interest pending the completion of the contract; for the contract when completed would amount to a sale of the trust property by the trustee to himself in exercise of his authority to sell (*m*). When the trust property has been fairly sold to a stranger in exercise of a trust for or power of sale, and the contract has been completed, the rules of equity do not prevent any one of the trustees from afterwards buying the property: but, of course, if the purchase by the trustee took place very shortly after the completion of the former sale, the circumstances would be suspicious, and the trustee might have to prove that he acted in good faith (*n*). A trustee for sale is no

Retirement in view of purchase.

Purchase long after retirement.

Trustee for sale cannot be sub-purchaser from a stranger pending completion of the original sale.

(*d*) See above, pp. 241, 248, 251.

(*e*) See cases cited above, p. 954, nn. (*l*), (*m*), (*n*), p. 955, n. (*p*); also *Fox* v. *Mackreth*, 2 Bro. C. C. 400, 2 Cox, 320, 4 Bro. P. C. 258, L. C. Eq.; *Whichcote* v. *Lawrence*, 3 Ves. 740.

(*f*) In this case the authority to sell, being given to all the trustees, is of course not well exercised.

(*g*) *Expte. Lacey*, 6 Ves. 625; *Lister* v. *Lister*, ib. 631; *Expte. Bennett*, 10 Ves. 381, 393.

(*h*) Above, p. 954.

(*i*) *Expte. James*, 8 Ves. 337, 352; *Spring* v. *Pride*, 4 De G., J. S. 395.

(*k*) *Re Boles and British Land Co.'s Contract*, 1902, 1 Ch. 244.

(*l*) Above, p. 951.

(*m*) See cases cited above, p. 954, n. (*m*).

(*n*) See *Parker* v. *McKenna*, L. R. 10 Ch. 93, 126; above, p. 956, and n. (*b*); *Re Postlethwaite*, 60 L. T. 514.

Trustee for sale cannot buy from himself as agent for a stranger.

more competent to purchase the trust property as agent for a stranger to the trust than he is to buy it for himself (*o*). For to act as agent on behalf of a purchaser would obviously be in direct conflict with his duty as a trustee for sale (*o*); and, as we have seen (*p*), an authority to sell is not well exercised unless the vendor contract with some other person acting independently of him. So also a trustee exercising a trust or power to invest his trust money in the purchase of land is not at liberty to purchase his own land for the trust, for his interest as vendor would be opposed to his duty as trustee; and such a transaction would not amount to a true contract of purchase and would be an improper exercise of his authority to buy (*q*).

Trustee for purchase.

Trustee in bankruptcy.

Executor or administrator.

Tenant for life.

Rule not applicable where a trustee is not himself exercising an authority to sell or buy.

The duties of a trustee for sale and the consequent disability to purchase are incumbent on a trustee (and formerly on an assignee) in bankruptcy selling the bankrupt's property in exercise of his statutory power of sale (*r*); on an executor or administrator selling leaseholds or other personalty of the deceased to raise money for payment of funeral or testamentary expenses or debts (*s*); on an executor selling lands under any power of sale expressly or impliedly conferred on him by the will for the purposes of his office (*t*), or under the power of sale given to him by Lord St. Leonards' Act (*u*) or the Land Transfer Act, 1897 (*x*); and, it is thought, on a tenant for life selling the settled land under the power conferred on him by the Settled Land Act, 1882 (*y*). On the other hand, the rule in question does not apply unless the trustee purchasing or selling be *himself* exercising an authority to sell or buy conferred on him by the instrument creating the trust. Thus a bare trustee (*z*),

(*o*) *Expte. Bennett,* 10 Ves. 381; *Hesse* v. *Briant,* 6 De G., M. & G. 623, 628.

(*p*) Above, p. 956.

(*q*) Above, p. 954, and cases cited in note (*l*).

(*r*) *Expte. Lacey,* 6 Ves. 625; *Expte. Bennett,* 10 Ves. 380, 395; Bankruptcy Rules, 1915, No. 347, expressly applying the principle in question to the trustee and to any member of the committee of inspection.

(*s*) *Killick* v. *Flexney,* 4 Bro. C. C. 161; *Hall* v. *Hallet,* 1 Cox, 134; *Watson* v. *Toone,* 6 Madd. 153; see above, pp. 201, 210, n. (*g*).

(*t*) See *Baker* v. *Read,* 18 Beav. 398; *Smedley* v. *Varley,* 23 Beav. 388; above, pp. 208, 209.

(*u*) Above, pp. 209-211.

(*x*) Above, pp. 211 *sq.*

(*y*) See above, pp. 282, 311-313; *Boyce* v. *Edbrooke,* 1903, 1 Ch. 836; 1 Dart, V. & P. 37, 42, 6th ed.; 39, 7th ed.

(*z*) Above, p. 203, n. (*b*).

or a trustee of land under a simple trust of land for one in fee (*a*), is not absolutely incapacitated from purchasing the trust property; for such an one has no power of sale (*b*); and if he buy, the *cestui-que-trust* must necessarily be the vendor (*c*). So also a trustee who has disclaimed or never acted in the trust (*d*), or an executor who has renounced probate or has never intermeddled with the testator's estate (*e*), is under no disability to purchase property sold by the other trustees or executors under any authority vested in them by the terms of the trust-instrument or by virtue of their office. And where a trustee for sale of a house, who was a solicitor and was also the tenant for life under a settlement of personalty, requested the settlement trustees to buy the house under a power in the settlement as a residence for himself and his wife, and as such trustee put the house up for sale by auction, employing the auctioneer to fix the reserve price, but also acted as solicitor for the settlement trustees in instructing an agent to bid for them at the sale up to a price exceeding the reserve, and the agent bought the house at the auction at a price exceeding the reserve, but less than that up to which he was authorised to bid, it was held that in substance the settlement trustees were the purchasers, that the vendor-trustee had acted correctly, and that his interest in the purchase was not sufficient to invalidate the sale (*f*).

Hickley v. *Hickley.*

With respect to sales of settled land to the tenant for life under the settlement, it may be mentioned that, where the trustees of a settlement of land are empowered to sell with the consent of the tenant for life, it has been held held that they well sell to him (*g*). And under the Settled Land Act, 1890 (*h*), where a sale of settled land is to be made to the tenant for life, or a purchase is to be made from him of land to be made subject to the limitations of the settlement, or an exchange is to be made

Trustees selling under a power of sale exerciseable with the consent of the tenant for life may sell to him.

Sale, purchase, exchange or partition in

(*a*) Above, p. 241.
(*b*) *Parkes* v. *White,* 11 Ves. 209, 226; above, p. 241.
(*c*) See above, p. 949.
(*d*) *Stacey* v. *Elph,* 1 My. & K. 195.
(*e*) *Macintosh* v. *Barber,* 1 Bing. 50; *Clark* v. *Clark,* 9 App. Cas. 733; *Re Boles and British Land Co.'s Contract,* 1902, 1 Ch. 244, 247.
(*f*) *Hickley* v. *Hickley* (Bacon, V.-C.), 2 Ch. D. 190; approved in *Farrar* v. *Farrars, Ld.,* 40 Ch. D. 395, 405, 415.
(*g*) *Howard* v. *Ducane,* T. & R. 81; *Dicconson* v. *Talbot,* L. R. 6 Ch. 32. See *Grover* v. *Hugell,* 3 Russ. 428, 432; *Beaden* v. *King,* 9 Hare, 499, 519-521.
(*h*) Stat. 53 & 54 Vict. c. 69, s. 12, passed 18th Aug. 1890.

favour of tenant for life under Settled Land Act, 1890.

with him of settled land for other land, or a partition is to be made with him of land an undivided share whereof is subject to the limitations of the settlement, the trustees of the settlement shall stand in the place of and represent the tenant for life, and shall, in addition to their powers as trustees, have all the powers of the tenant for life in reference to negotiating and completing the transaction. It is important to remark, in connection with the sale of land, that the better opinion is that a power to lease land is entirely governed by the rule now under consideration as well as a power to sell, and cannot therefore be well exercised by a lease made, either directly or indirectly, to the donee of the power: unless such a lease be authorised by the instrument conferring the power (*i*). Thus, a lease of settled land cannot well be made by a tenant for life to himself, or (it is thought) to a trustee for himself, under the power of leasing given to him by the Settled Estates Act, 1877 (*i*), or the Settled Land Act, 1882 (*j*). And the Settled Land Act, 1890 (*h*), does not enable any such lease to be made by the trustees of the settlement.

Power to lease land.

Persons in a fiduciary position as regards the exercise of an authority to sell or purchase.

Principal and agent.

The rules governing the case of a trustee for sale or purchase are equally applicable in every instance in which a person exercising an authority to sell or purchase stands in a fiduciary relation to the person by or on whose behalf the authority was conferred; although the former may not be a trustee under a formally constituted trust. Thus, an agent employed to sell or purchase land, such as an auctioneer, an estate agent, or a solicitor, cannot buy the principal's land from himself for his own use or purchase his own land from himself for the principal (*k*): though he may buy the principal's land *from the principal* or sell his own land *to the principal*, subject to the rules affecting that class of contract (*l*). So also a director of a company cannot purchase the company's land from his co-directors and himself (*m*), and if he sell his own property to the

Directors of a company.

(*h*) Stat. 53 & 54 Vict. c. 69, s. 12, passed 18th Aug. 1890.

(*i*) Farwell, J., *Boyce* v. *Edbrooke*, 1903, 1 Ch. 836, 843 *sq.*; dissenting from the opinion expressed by Page Wood, V.-C., in *Bevan* v. *Habgood*, 1 J. & H. 222, 229. And see *A.-G.* v. *Clarendon*, 17 Ves. 491, 500.

(*j*) Above, p. 958.

(*k*) *Oliver* v. *Court*, 8 Price, 127; above, p. 952, and n. (*e*).

(*l*) See above, pp. 952, 953.

(*m*) *Aberdeen Ry. Co.* v. *Blaikie*, 1 Macq. 461. And, unless authorised by the company's articles, the board of directors cannot sell to

company, the sale is voidable at the company's option (*n*). Nor can the liquidator of a company sell its assets to a trustee for himself (*o*). Promoters also stand in a fiduciary relation to the company which they promote; and if they sell their own property to the company by the agency of themselves acting as directors, and concealing from the shareholders their ownership of the property sold or the nature of their interest in the sale, the contract is voidable at the company's option accordingly (*p*). If, however, persons acquire property at a time when they do not stand in the relation of promoters to any contemplated company, they are at liberty to sell that property to any company which they may afterwards promote (*q*): but in order that such a sale may be valid and unimpeachable, it must be carried out through the agency of an independent board of directors informed of the promoters' interests and capable of exercising an unbiassed judgment as to the terms of the sale, or, if the directors be the promoters themselves or their nominees, full disclosure must be made to the shareholders of the promoters' position as vendors and as directors of the purchasing company, of the nature of their interests in the property which they sell to the company, and of their profit (if any) on the sale (*r*).

Liquidator.

Promoters.

As already mentioned (*s*), in every instance in which a person exercising an authority to sell or purchase stands in a fiduciary relation to those by whom or on whose behalf the authority was conferred, the rule, that he cannot sell to or buy from himself, may be justified on the principle that he shall not be allowed to

another company in which a director voting for the sale holds shares, whether he holds them beneficially or as a trustee; *Transvaal Lands Co.* v. *New Belgian, &c. Co.*, 1914, 2 Ch. 488.

(*n*) *Burland* v. *Earle*, 1902, A. C. 83, 98, 99.

(*o*) *Silkstone and Haigh Moor Coal Co.* v. *Edey*, 1900, 1 Ch. 167.

(*p*) *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, 1229, 1236, 1260; *Re Cape Breton Co.*, 29 Ch. D. 795, 811; *Gluckstein* v. *Barnes*, 1900, A. C. 240; *Re Lady Forrest, &c., Ld.*, 1901, 1 Ch. 582, 589, 590; see *Re Darby*, 1911, 1 K. B. 95; and cf. *A.-G. for Canada* v. *Standard Trust Co. of New York*, 1911, A. C. 498.

(*q*) *Gover's case*, 1 Ch. D. 182, 187.

(*r*) See *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, 1899, 2 Ch. 392; *Omnium Electric Palaces, Ld.* v. *Baines*, 1914, 1 Ch. 332; and cases cited in note (*p*), above. And in a matter *intra vires* the company, any action taken by all the shareholders will be valid notwithstanding technical irregularities; *Re Express Engineering Works*, 1920, 1 Ch. 466; *Re Oxted Motor Co.*, 1921, 3 K. B. 32; see above, p. 919, n.(*u*).

(*s*) Above, pp. 954, 955.

place his own interest in conflict with his duty. Even in these cases, however, the rule appears to rest, at bottom, on the ground that a sale or purchase by the authorised person to or from himself is no contract at all, and is therefore no proper exercise of the authority. Expressed in this form, the rule is equally applicable where the person exercising the authority does *not* stand in a fiduciary relation to those by whom or on whose behalf the authority was conferred (*t*). Thus it governs, not only the case of a mortgagee exercising his powers of sale (*u*), but every instance in which a person entitled to a charge on any property is invested with a power or authority to sell the property in order to realise the amount of money charged (*x*). And the reason of the rule appears to be equally applicable to the exercise of any *authority* to *purchase* land.

Application of the rule where the party exercising the authority is not in a fiduciary position.

Person invested with an authority to sell cannot well exercise it in favour of his own agent in the matter.

Person exercising an authority in favour of an independent party through whom he has an interest in the sale.

The rule in question has two corollaries. First, that as the person invested with an authority to sell or purchase cannot well exercise it by selling to or purchasing from himself, so also he cannot well exercise it in favour of any agent employed by him to conduct or act in the sale; for the agent has the same duties as the principal in the matter of the sale (*y*), and their personality is regarded as identical (*z*). Secondly, that where a person authorised to sell or purchase land contracts with an independent buyer or seller, through whom he has himself an interest in the sale opposed to the interest of his principal, then, if the buyer or seller have notice of this fact and of the consequent conflict of interest and duty, the *onus* lies on him of proving the fairness of the transaction; and the sale is voidable, at the option of those by or on whose behalf the authority was conferred, in case of his failure to discharge the burthen of proof (*a*). For example, the solicitor or auctioneer employed to conduct a sale of land by a person selling it under a trust for

(*t*) Above, pp. 955, 956.
(*u*) Above, pp. 320, 955.
(*x*) *Re Bloye's Trusts*, 1 Mac. & G. 488; *S. C.*, nom. *Lewis* v. *Hillman*, 3 H. L. C. 607, 628-630.
(*y*) *Whitcomb* v. *Minchin*, 5 Madd. 91; *Re Bloye's Trusts*, 1 Mac. & G. 488, 496; *S. C.*, nom. *Lewis* v. *Hillman*, 3 H. L. C. 607; *Martinson* v. *Clowes*, 21 Ch. D. 857; *Farrar* v. *Farrars, Ld.*, 40 Ch. D. 395, 409; *Hodson* v. *Deans*, 1903, 2 Ch. 647.
(*z*) Above, p. 234.
(*a*) *Hesse* v. *Briant*, 6 De G., M. & G. 623; *Farrar* v. *Farrars, Ld.*, 40 Ch. D. 395; *Hodson* v. *Deans*, 1903, 2 Ch. 647, 653. But cf. *Hickley* v. *Hickley*, 2 Ch. D. 190, above, p. 959.

or power of sale cannot become the purchaser thereof (*b*). And where a building society sells land in exercise of a mortgagee's power of sale, and the secretary or a member of the committee of the society has taken part in conducting the sale, he cannot purchase the land under an exercise of the power (*c*). The first corollary is not, however, applicable unless the purchaser and the person exercising the authority stand at the time of the sale in the relation of agent and principal. Thus, if a solicitor or other agent be employed in a proposed sale by a person exercising an authority to sell, and the sale prove to be abortive, and the relation of principal and agent be dissolved, and some time afterwards the former agent purchase the property, the sale is not *void* according to the rule in question, though it is voidable in case the purchaser took any unfair advantage of his former position as agent and the *onus* lies on him of proving that he did not (*d*). So where one of several mortgagees, who acted as their solicitor, promoted a company to buy the mortgaged property and became a substantial shareholder therein, and the company then bought the property from the mortgagees selling under their power of sale, it was held that the sale, being made to the company, a distinct and independent legal personality, was not void as being a sale to the solicitor mortgagee himself. It was, however, considered that, in view of the conflict between interest and duty involved in the solicitor's position of vendor and shareholder in the purchasing company, the company having notice thereof were charged with the burthen of upholding the sale, as against the mortgagors seeking to redeem; though in the circumstances the sale was upheld (*e*). This illustrates the second corollary. In like manner, where a solicitor authorised by one of his clients to sell the client's land sold it to another of his clients, for whom he acted in the matter of the purchase and the purchaser had notice of the solicitor's position, it was held that the contract was not specifically enforceable

Farrar v. *Farrars, Ltd.*

(*b*) *Downes* v. *Grazebrook*, 3 Mer. 200, 209; *Re Bloye's Trusts*, 1 Mac. & G. 488; *S. C.*, nom. *Lewis* v. *Hillman*, 3 H. L. C. 607.

(*c*) *Martinson* v. *Clowes*, 21 Ch. D. 857; affirmed, 52 L. T. 706, W. N. (1885) 41; *Hodson* v. *Deans*, 1903, 2 Ch. 647.

(*d*) *Nutt* v. *Easton*, 1899, 1 Ch. 873, 878, affirmed on the ground of laches, 1900, 1 Ch. 29; *Re Boles and British Land Co.'s Contract*, 1902, 1 Ch. 244; see above, pp. 951, 952.

(*e*) *Farrar* v. *Farrars, Ltd.*, 40 Ch. D. 395.

at the purchaser's suit unless he could prove that the vendor was at no disadvantage and the transaction was fair (*f*).

Where the terms of the authority allow of its being exercised in favour of the person, to whom it is given.

As above stated (*g*), if the instrument creating an authority to sell or purchase expressly or impliedly permit the person, to whom the authority is given, to be himself the purchaser or vendor, the case is taken out of the general rule; and he may well sell to or buy from himself in exercise of the power (*h*). Thus trustees for sale appointed by will are sometimes authorised to become the purchasers of the trust property (*i*). And directors of a company are frequently authorised by the articles of association to contract with the company, provided that their interest in such contract be disclosed (*k*). But, of course, in every case in which a person invested with an authority to sell or purchase is specially empowered to be himself the purchaser or vendor, the terms of the special power must be strictly observed; if not, the general rule will prevail (*l*).

Purchase of the trust property by a trustee for sale from his *cestui-que-trusts*; or

by leave of the Court.

We have seen (*m*) that any trustee, notwithstanding that he be a trustee for sale, may purchase the whole or any part of the beneficial interest in the trust property from his *cestui-que-trusts*, subject to the rule governing this particular kind of contract and explained above (*n*). But of course an effective purchase of this kind can only be made of the interests of such of the *cestui-que-trusts* as are *sui juris* (*o*). A trustee for sale may also be allowed to purchase the trust property by leave of the High Court or another Court of competent jurisdiction (*p*).

(*f*) *Hesse* v. *Briant*, 6 De G., M. & G. 623; see above, p. 957.
(*g*) Above, p. 954.
(*h*) *Beaden* v. *King*, 9 Hare, 499, 519, 520; *Boyce* v. *Edbrooke*, 1903, 1 Ch. 836, 846, 847.
(*i*) Davidson, Prec. Conv. Vol. IV. p. 84, n., 3rd ed.
(*k*) See *Imperial Mercantile Credit Asson.* v. *Coleman*, L. R. 6 Ch. 558; reversed, L. R. 6 H. L. 189, on the ground that disclosure was not duly made; *Costa Rica Ry. Co.* v. *Forwood*, 1901, 1 Ch. 746; *Transvaal Lands Co.* v. *New Belgian, &c. Co.*, 1914, 2 Ch. 488.
(*l*) Consider the cases cited in the previous note; and the case of promoters of a company, above, p. 961.
(*m*) Above, p. 950.
(*n*) Above, p. 951.
(*o*) See *Franks* v. *Bollans*, L. R. 3 Ch. 717.
(*p*) The County Courts have the equitable jurisdiction of the High Court in proceedings for the execution of trusts, where the trust estate does not exceed the value of 500*l.*; stat. 51 & 52 Vict. c. 43, s. 57; and the Courts of Chancery of the counties palatine of Lancaster and Durham exercise equitable jurisdiction; see Wms. Real Prop. 207, 297, n. (*c*), 23rd ed.

Where all the *cestui-que-trusts* are absolutely entitled and *sui juris*, and it is proposed that their trustee for sale shall purchase the trust property, it is for them to decide whether he shall be allowed to do so; and if application be made to the Court to execute the trust for sale, the Court will not in the first instance give leave for the trustee to bid at the sale, or to purchase, against the wishes of any of those beneficially entitled. If, however, it prove impossible to sell the estate to anyone else for so good a price as the trustee offers, the Court may then sanction the purchase (*q*). Where any of the *cestui-que-trusts* are infants or otherwise under disability (*r*), or are unborn or unascertained persons, the Court has jurisdiction to give leave on their behalf for the trustee for sale to be himself the purchaser: but such leave will not be given unless it be shown that the trust property cannot be so advantageously disposed of to any other person (*s*). It appears that, where leave is given by the Court for a trustee to bid at a sale by the Court or to purchase the trust property, he is placed in the same position as any other purchaser (*t*), and the sale is not voidable for mere non-disclosure by him of all facts within his knowledge affecting the value of the property. But if, on the application to obtain such leave, the trustee intentionally withhold information which he has acquired and which tends to enhance the value of the property, such conduct is fraudulent, and the sale would be voidable accordingly (*u*). Trustees for the purchase of land may in like manner and subject to similar conditions sell their own land to their *cestui-que-trusts* (and not to themselves) (*x*), or may buy the same for the trust with the leave of the Court (*y*).

Position of trustee for sale buying by leave of the Court.

Trustees for purchase.

Where one invested with an authority to sell or purchase in effect sells to or buys from himself, the persons by or on whose behalf the authority was conferred have the option of affirming or avoiding the transaction; and if they elect to affirm

Rights of the persons injured by the improper exercise of an authority to sell or purchase.

(*q*) *Expte. James*, 8 Ves. 337, 352, 353; *Tennant* v. *Trenchard*, L. R. 4 Ch. 537, 545-547.

(*r*) See above, pp. 854, 862, 863, 911.

(*s*) *Campbell* v. *Walker*, 5 Ves. 678, 681; *Farmer* v. *Dean*, 32 Beav. 327; *Tennant* v. *Trenchard*, L. R. 4 Ch. 537, 547.

(*t*) Above, p. 757.

(*u*) See *Boswell* v. *Coaks*, 23 Ch. D. 302; reversed, 27 Ch. D. 424; and restored, 11 App. Cas. 232, 235-237, 240; above, pp. 759, 760.

(*x*) Above, p. 951, and n. (*p*).

(*y*) Lewin on Trusts, 439, 6th ed.; 590, 12th ed.

it, the person authorised is firmly bound and cannot maintain, as against them, that the purported exercise of his authority was void (*z*). As in the case of a conveyance induced by fraud or undue influence (*a*), affirmation of the transaction may be either express, or implied from the acts of the parties (*b*); as from long inaction (*c*), or, in the case of a purchase, from using the land as their own, after they have become aware of the facts entitling them to set the sale aside (*d*). But no inaction or user can be evidence of an intention to affirm the transaction, so long as the injured parties had no knowledge of the facts giving rise to the right to rescind (*e*). When the sale has been once affirmed, either expressly or impliedly, it cannot afterwards be set aside (*f*).

Affirmation may be express or implied.

Avoidance of the transaction.

Where the person authorised is in a fiduciary position, and the authority is to sell.

If the injured parties choose to avoid the transaction, their rights vary according as the person, to whom the authority was given, did or did not stand in a fiduciary relation to them, and according as the authority were for sale or purchase. In the case of an authority given to a person in a fiduciary position to sell land, the injured parties may claim to have either a reconveyance to them or a resale for their benefit of the property in question, or if the trustee for sale have disposed of the land or any part thereof to a purchaser, from whom it cannot be recovered, they may claim to make the trustee accountable with interest at four per cent. (*g*) for any profit realised by him on such re-sale or else for the true value of the land over and above the price paid on the attempted sale to himself (*h*). And where the land has been so resold, the injured parties are en-

(*z*) *Expte. Hughes,* 6 Ves. 617, 623-625.

(*a*) Above, pp. 809, 810, 830.

(*b*) *Morse* v. *Royal,* 12 Ves. 355.

(*c*) *Gregory* v. *Gregory,* G. Coop. 201, Jac. 631; *Baker* v. *Read,* 18 Beav. 398, 3 W. R. 118; and see *Harcourt* v. *White,* 28 Beav. 303, 309-311.

(*d*) *Re Cape Breton Co.,* 29 Ch. D. 795; *Ladywell Mining Co.* v. *Brookes,* 35 Ch. D. 400; *Re Lady Forrest Mine,* 1901, 1 Ch. 582.

(*e*) *Randall* v. *Errington,* 10 Ves. 423; *Chalmer* v. *Bradley,* 1 J. & W. 51, 67, 68; *Charter* v. *Trevelyan,* 11 Cl. & Fin. 714, 738, 739, 740; *Life Association of Scotland* v. *Siddal,* 3 De G., F. & J. 58, 74, 77; *De Bussche* v. *Alt,* 8 Ch. D. 286, 314; above, p. 830, and n. (*o*).

(*f*) See last note but one; above, p. 810.

(*g*) Above, p. 816, n. (*d*).

(*h*) *Fox* v. *Mackreth,* 2 Bro. C. C. 400, 420, 421, 2 Cox, 320-322; *Hall* v. *Hallet,* 1 Cox, 134, 139; *Hardwicke* v. *Vernon,* 4 Ves. 411; *Expte. Reynolds,* 5 Ves. 707; *Expte. Hughes,* 6 Ves. 617; *Expte. Lacey,* ib. 625, 630; *Expte. James,* 8 Ves. 337, 351; *Randall* v. *Errington,* 10 Ves. 423.

titled to an inquiry as to the true value of the land when sold by the trustee to himself and as to the profits realised on the resale, and may make the trustee account with interest for the profits realised by him or for the difference between the true value and the price at which he affected to take over the estate, as may be most beneficial to them (*h*). Where a reconveyance is claimed, the trustee for sale must account on the footing of wilful default, but without interest, for all rents and profits received or receivable by him since the sale, and he will be charged with an occupation rent for any part of the property, of which he has been himself in possession: but he may claim the return of his purchase-money with interest at four per cent. and an allowance for necessary outgoings and substantial improvements and repairs (*i*). If a resale be desired, it will be ordered conditionally on the trustee for sale being obliged to adhere to his purchase in case the price obtained on the resale be less than what he gave for the land (*k*). If the land fetch a higher price on the resale, the trustee may claim to be recouped thereout all sums expended by him in necessary outgoings and substantial improvements or repairs: but he must account, as in the case of reconveyance, for all rents and profits received or receivable by him prior to the resale (*l*).

Where the person authorised is not in a fiduciary position.

Where there is no fiduciary relation between the person on whom the authority was conferred and those by whom or on whose behalf it was given, it does not appear that the latter can insist on resale if they elect to set the transaction aside; their rights appear to be confined to claiming a reconveyance on such terms as they would be entitled to demand it, if the transaction had never taken place. Thus, if they be mortgagors and the mortgagee has sold to himself in attempted exercise of his power of sale, their right is to redeem, that is, to demand a reconveyance on payment of principal and interest due on the mortgage debt, and costs (*m*). And the mortgagee, having in fact taken

(*h*) See note (*h*), previous page.

(*i*) See cases cited in previous note; *Silkstone and Haigh Moor Coal Co.* v. *Edey*, 1900, 1 Ch. 167.

(*k*) *Expte. Reynolds*, 5 Ves. 707; *Expte. Hughes*, 6 Ves. 617; *Expte. Lacey*, ib. 625; *Expte. James*, 8 Ves. 337.

(*l*) Ibid.

(*m*) See *Re Bloye's Trusts*, 1 Mac. & G. 488, 503 *sq.*; *S. C.*, nom. *Lewis* v. *Hillman*, 3 H. L. C. 607, 631 *sq.*; *National Bank of Australasia* v. *United, &c. Co.*, 4 App. Cas. 391; *Martinson* v. *Clowes*, 21 Ch. D. 857, 861, 862; *Hodson* v. *Deans*, 1903, 2 Ch. 647.

possession under colour of a sale to himself, is liable to account as a mortgagee in possession and on the footing of wilful default for all rents and profits actually received or possibly receivable by him in respect of the mortgaged property: but he does not incur the same liability exactly as a trustee for sale. Thus, where the mortgagee being in possession under a colourable sale has resold the whole or a part of the property to a purchaser from whom it cannot be recovered, he is of course chargeable with the actual price received on the resale: but if he resold at a loss, or at an undervalue, he is not chargeable (as a trustee would be (*n*)) with the difference between the actual price obtained on the resale and the true value of the property at the time when he purchased it for himself, but can only be made to account for the difference between the price at which he actually resold and that for which he might, but for his wilful default or negligence, have sold the property to the sub-purchaser (*o*).

Within what limits the sale may be set aside.

A sale of land made, in exercise of an authority to sell, by the person so authorised to or in trust for himself, is voidable *by* all persons, who may succeed to the estate or right of those by whom or on whose behalf the authority was conferred (*p*).

Prior to completion.

And so long as the sale rests in contract only and has not been completed by conveyance, it is voidable *against* all persons, who claim under it, whether gratuitously or for value, and whether with or without notice of the facts avoiding the sale (*q*).

After completion, the extent of the right varies according to the manner of making the conveyance.

After the contract has been completed, the extent of the injured parties' right to relief varies according as they themselves concurred in the conveyance or as the land were assured by the authorised person alone, in professed exercise of his authority. In the former case the injured persons have themselves conveyed away their own estates and given an apparent and, to some extent, a real consent to the sale; though they might not have so consented if they had known the true facts (*r*). The conveyance is therefore not altogether void: although, if the

(*n*) Above, p. 967.

(*o*) *National Bank of Australasia* v. *United, &c. Co.*, 4 App. Cas. 391, 410-412.

(*p*) *Randall* v. *Errington*, 10 Ves. 423; *Charter* v. *Trevelyan*, 11 Cl. & Fin. 713; *Bailey* v. *Barnes*, 1894, 1 Ch. 25.

(*q*) Above, pp. 749, 954, n. (*m*); and see *Re Palmer's, &c. Co.*, 1904, 2 Ch. 743.

(*r*) See above, p. 748.

conveying parties were aware of the facts, the assurance may be voidable as a sale by *cestui-que-trust* to trustee, or by principal to agent, or on similar grounds (*s*); and if the facts were fraudulently concealed, it will be voidable as a conveyance induced by fraud (*t*). In either instance, the conveying parties, having by their own act parted with all their estate, have only a bare right of action in equity to set aside the sale. This may be successfully asserted against the purchaser and his trustee or nominee, their representatives in law, and all other persons who may succeed to their estate, either gratuitously, with or without notice of the facts invalidating the sale (*u*), or for value, but with notice of those facts (*x*): but such a right is of no avail against any person claiming under the conveyance as purchaser for value without notice of the impropriety of the sale, whether he has acquired a legal or only an equitable interest in the land (*y*). If, however, the contract were completed by a conveyance made by the person authorised to sell in professed exercise of his authority to assure the land on sale, then, as the transaction is altogether void in equity as an exercise of the authority (*z*), the *equitable* estate or interest authorised to be conveyed never passes away from those persons by whom or on whose behalf the authority was given (*a*). Their right in this case, therefore, is no bare right of action to set aside a conveyance made by themselves, but is the right incident to the ownership of the equitable *estate* in the land to recover possession, when wrongfully ousted. It follows that, if after such conveyance the whole or any part of the property have been disposed of to a sub-purchaser for value without notice of the facts avoiding the original sale, he is only entitled to retain the property, as against the parties injured by the original sale, in case he has acquired a *legal* estate or interest in the land. If his interest be equitable only, they can recover the property from him, and the plea of purchase for value without notice

(*s*) Above, pp. 950-953, 960.
(*t*) *Charter* v. *Trevelyan*, 11 Cl. & Fin. 714; *Lewis* v. *Hillman*, 3 H. L. C. 607, 630.
(*u*) *Charter* v. *Trevelyan*, 11 Cl. & Fin. 714.
(*x*) *Cookson* v. *Lee*, 23 L. J. Ch. 473.
(*y*) See above, pp. 749 and n. (*h*), 811, 813, 830, 848, and n. (*o*).
(*z*) Above, pp. 955, 956.
(*a*) See *Randall* v. *Errington*, 10 Ves. 423; *National Bank of Australasia* v. *United, &c. Co.*, 4 App. Cas. 391; *Bailey* v. *Barnes*, 1894, 1 Ch. 25.

will afford him no defence (*b*). But if the authority given were ostensibly exercised in favour of some other than the person authorised, and the sub-purchaser had no notice, at the time when he himself purchased an equitable interest, of the facts avoiding the original sale, he may afterwards get in the legal estate from any one, who can and will convey it to him without breach of trust; and he will then be entitled, under the doctrine of tacking, to exclude those seeking to set aside the original sale (*c*).

Tacking.

Illustration of the distinction.

The distinction above pointed out (*d*) may be illustrated by the following examples:—If an estate agent authorised to sell his principal's land covertly purchase it himself through the interposition of a third party as his nominee, and the sale be completed by a conveyance *from the principal* to the nominee, the agent's interest in the purchase not being disclosed, the conveyance is voidable by the principal and his successors in interest as having been induced by the agent's fraud (*e*). But the principal, having parted with his *estate* in the land by his own act and consent, is left with a bare right of action in equity to set aside the conveyance, and this is not available against *any* person claiming under the conveyance as purchaser for value without notice of the facts invalidating the conveyance (*f*). Where, however, land is vested in a trustee for sale and he sells and conveys it to a nominee for his own benefit, the legal estate

(*b*) *National Bank of Australasia* v. *United, &c. Co.*, 4 App. Cas. 391, 407; *Bailey* v. *Barnes*, 1894, 1 Ch. 25. These cases, it is submitted, recognise and illustrate the true principle applicable; which is, that where there is a fraud on a power, the exercise of the authority is altogether void, even as against persons claiming under it as purchasers for value in good faith, unless they can claim the protection of the legal estate; *Daubeny* v. *Cockburn*, 1 Mer. 626; Sug. Pow. 616, 8th ed.; *Cloutte* v. *Storey*, 1911, 1 Ch. 18. It should be noted, however, that in the old Scotch case of *York Buildings Co.* v. *Mackenzie*, 8 Bro. P. C. 42, 70, the sale was set aside without prejudice to the interests of lessees and others who might have contracted *bonâ fide* with the person purporting to purchase; and this case has been cited as establishing a similar rule in English law; Lewin on Trusts, 429, 430, 6th ed.; 577, 579, 12th ed. But it is submitted that this was a mistake.

(*c*) *Bailey* v. *Barnes*, 1894, 1 Ch. 25; see also *Jones* v. *Powles*, 3 My. & K. 581; *Young* v. *Young*, L. R. 3 Eq. 801; above, pp. 321, 453-455, 536.

(*d*) Above, p. 968.

(*e*) *Charter* v. *Trevelyan*, 11 Cl. & Fin. 714.

(*f*) Above, pp. 749, and n. (*h*), 811, 813, 830, 848, and n. (*o*), 969.

indeed passes to the nominee, but the equitable *interest* still remains in the *cestui-que-trusts*, and can be asserted by them as against all persons who have subsequently taken the trustee's estate, except only those who have acquired a legal estate or interest in the land as purchasers for value without notice of the facts avoiding the original sale (*g*). So, where a mortgagee in attempted exercise of his power of sale sells and conveys the mortgaged land to a nominee for himself, the mortgagor is entitled to redeem against all persons claiming under the sale as purchasers for value without notice of its invalidity, but having only an equitable estate or interest in the land (*h*).

The legal estate may not always pass on a sale by a person exercising an authority to sell to a nominee for his own benefit.

Here it may be noticed that, if an authority to sell land be exercised by a sale to a nominee for the benefit of the person authorised, and the sale be completed by the execution of a mere power (strictly so called) to convey the land, the nominee may not in some cases obtain the legal estate. He will obtain it if at law the terms of the power have been complied with (*i*): but otherwise not (*k*). For instance, it appears to be a condition precedent to the valid exercise at law of the power of sale and conveyance given to a tenant for life by the Settled Land Act, 1882, that the sale shall be made at the best price that can reasonably be obtained (*l*). So, if he were to sell at an undervalue to a nominee for himself, it appears that the legal estate would not pass by his conveyance in attempted exercise of the statutory power (*m*). And it is thought that a sub-purchaser from the nominee could be in no better position, notwithstanding that he bought without notice of the facts avoiding the original sale (*n*).

Terms of setting aside the sale where the authority is to purchase.

The same principles apply in the case of an authority to buy land exercised by a purchase of the authorised person's own property. Those who gave the authority, or their successors in interest, have the right to set aside the sale and to claim

(*g*) *Randall* v. *Errington*, 10 Ves. 423, 429, where the sub-sale had obviously been completed by conveyance.
(*h*) *National Bank of Australasia* v. *United, &c. Co.*, 4 App. Cas. 391, 407; *Bailey* v. *Barnes*, 1894, 1 Ch. 25.
(*i*) Above, p. 956.
(*k*) Above, pp. 276, 281.
(*l*) Above, pp. 283, 311.
(*m*) See above, pp. 283, 311-313, and notes (*z*), (*f*).
(*n*) Above, p. 312, and n. (*z*).

repayment of the purchase-money with interest at 4 per cent., but must themselves re-convey the land and account for the rents and profits received during their possession of it (*o*). It appears, however, that, as in the case of a purchase induced by fraud (*p*), the purchase cannot be set aside if by the purchaser's own act it has become impossible for him to make entire restitution of the land (*q*). Thus, where he has sold the whole or a substantial part of the land (*r*), or has extensively worked mines thereunder (*q*), he can no longer claim to have the purchase set aside. But it is not every act of waste or deterioration that will prevent the rescission of the transaction; if the consequent alteration of the property may be justly compensated by a money payment, a Court of Equity will nevertheless order the purchase to be set aside on the terms of the purchaser paying compensation accordingly (*s*). Where a man, exercising an authority to purchase vested in him in a fiduciary capacity, has covertly bought property, which is really his own, and the persons who gave the authority have by their own act, done in ignorance of the impropriety of the purchase, made it impossible for them to offer entire restitution, it appears that they may nevertheless recover compensation from him for any loss which they have suffered through his breach of trust. Thus, if the property were not fairly worth the price paid for it, they might, it is thought, recover the difference between the real value and the price (*t*). But where an agent for purchase, without fraudulent intent, buys land for his principal, which he had himself acquired before the commencement of the agency, and the principal becomes aware of the agent's interest and *afterwards* sells the land, or works, as his own property, mines thereunder, then the principal, acting with knowledge of the facts, has in effect

Where entire restitution is impossible through the act of the party injured.

Where the act was done in ignorance of the facts which entitled him to rescind.

Where the act was done with knowledge of such facts.

(*o*) *New Sombrero Phosphate Co.* v. *Erlanger*, 5 Ch. D. 73, 125; affirmed, 3 App. Cas. 1218. It appears that the purchaser is not liable to account on the footing of wilful default, except a special case be made out against him; see above, p. 831.

(*p*) Above, p. 811.

(*q*) *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, 1278; *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, 1899, 2 Ch. 392, 416, 423, 433, 456, 463, 464; *Armstrong* v. *Jackson*, 1917, 2 K. B. 822, 828-830.

(*r*) *Re Cape Breton Co.*, 29 Ch. D. 795.

(*s*) See note (*q*), above.

(*t*) See *Re Ambrose, &c. Co.*, 14 Ch. D. 390, 394; *Re Cape Breton Co.*, 29 Ch. D. 795, 811; *S. C.*, nom. *Bentinck* v. *Fenn*, 12 App. Cas. 652, 659; *Armstrong* v. *Jackson*, 1917, 2 K. B. 822, 828-830; cf. above, p. 966.

affirmed the purchase (*u*); and in this case he cannot, it appears, treat the agent as having been a trustee of the land for his benefit as from the time when the agent acquired it, and so make the agent accountable for any profit he has realised on the sale (*x*). If, however, the agent's conduct were actually fraudulent, the principal would be entitled to affirm the purchase and at the same time to claim compensation for any loss he had incurred (*y*); and where a trustee or a common agent for purchase covertly buys his own land for the *cestui-que-trust*, not disclosing his own interest in the transaction, such concealment is of itself sufficient evidence of fraud (*z*). Where an agent for purchase buys land on his own account after the agency has been constituted, and affects in exercise of his authority to purchase that land for his principal, at an increased price, he is of course accountable to the principal for any profit he has made, having been in effect a trustee of the land from the time when he bought it (*a*).

Actual fraud of the agent.

Agent for purchase selling his own land bought since the agency commenced.

Where on a sale of land the purchaser has notice from the abstract or otherwise (*b*), that the vendor derives title through a sale or other conveyance made in favour of one occupying a position, from which undue influence would be implied (*c*), or made of a *cestui-que-trust's* interest in the trust property to his trustee (*d*), the purchaser's advisers should point out the consequent objection (*e*) to the title and require the vendor to furnish

Title derived through a conveyance open to the objection of undue influence, or made by *cestui-que-trust* to trustee.

(*u*) Above, p. 966; C. A., *Lydney, &c. Co.* v. *Bird*, 33 Ch. D. 85, 94; Collins, L. J., *Re Olympia, Ld.*, 1898, 2 Ch. 153, 179.

(*x*) *Great Luxembourg Ry. Co.* v. *Magnay*, 25 Beav. 586; *Kimber* v. *Barber*, L. R. 8 Ch. 56, 57, n., 59; Cairns, C., *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, 1235, 1238, 1242; *Re Cape Breton Co.*, 26 Ch. D. 221, 29 Ch. D. 795; affirmed on other grounds, nom. *Bentinck* v. *Fenn*, 12 App. Cas. 652; *Ladywell Mining Co.* v. *Brookes*, 35 Ch. D. 400; *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, 1899, 2 Ch. 392; *Re Lady Forrest Mine*, 1901, 1 Ch. 582; *Burland* v. *Earle*, 1902, A. C. 83, 87, 98, 99; but see *Re Olympia, Ld.*, 1898, 2 Ch. 153, 170, 178, 179.

(*y*) Above, pp. 790, 795, 804, 805.

(*z*) *Charter* v. *Trevelyan*, 11 Cl. & Fin. 714, 738, 739; *Lewis* v. *Hillman*, 3 H. L. C. 607, 630; and see *Armstrong* v. *Jackson*, 1917, 2 K. B. 822, 824-827.

(*a*) *Tyrrell* v. *Bank of London*, 10 H. L. C. 26; *Kimber* v. *Barber*, L. R. 8 Ch. 56; *North American Land and Timber Co., Ld.* v. *Watkins*, 1904, 1 Ch. 242, 248; see also *Re Olympia, Ld.*, 1898, 2 Ch. 153, affirmed nom. *Gluckstein* v. *Barnes*, 1900, A. C. 240.

(*b*) *Spencer* v. *Topham*, 22 Beav. 573; above, pp. 224, 225, 232.

(*c*) Above, pp. 947-949.

(*d*) Above, pp. 949-953.

(*e*) Above, pp. 948, 951.

evidence that the circumstances and terms of the apparently objectionable transaction were such as to render it perfectly valid (*f*). If the vendor can produce such evidence, the purchaser will have to accept the title on that point; for when such an objection has been so removed, the Court does not consider the title too doubtful to be forced upon an unwilling purchaser, notwithstanding that the evidence offered do not include any testimony given by or conclusively binding the persons, who would be entitled to set the transaction aside (*g*). If, however, a vendor's title be derived through a sale made by a person, exercising an authority to sell, in his own favour, the nature of the objection to the title is entirely different; as in equity the exercise of the authority is void, and the equitable estate authorised to be conveyed has never passed away from the persons by whom or on whose behalf the authority was conferred (*h*). In this case, therefore, the purchaser cannot be obliged to accept the title, without the concurrence of those persons or their successors in estate, all being *sui juris* (*i*).

Title derived through a sale by one, exercising an authority to sell, to himself.

(*f*) See above, pp. 823, 824.
(*g*) *Spencer* v. *Topham*, 22 Beav. 573, 582.
(*h*) Above, pp. 954 *sq.*, 966-971.
(*i*) *Re Douglas and Powell's Contract*, 1902, 2 Ch. 296; *Delves* v. *Gray*, ib. 606, 611.

CHAPTER XVIII.

OF THE DISCHARGE OF THE CONTRACT.

§ 1. Of the Discharge of the Contract before Breach, and by Performance.
§ 2. Of Breach of the Contract and Discharge therefrom after Breach.

Discharge of the obligations of the contract.

HAVING finished the subject of the avoidance of the contract for fraud or other causes (*a*), it is now proposed, before considering the remedies for breach of the contract, to examine the various ways in which the obligations arising out of the contract (*b*) may be discharged, and the parties freed from the legal bond which unites them. This discharge may take place either before the performance and before any breach of the contract, or at the time and by the very fact of performance of the contract, or after a breach of contract has occurred.

§ 1.—*Of the Discharge of the Contract before Breach, and by Performance.*

Discharge of contract before breach.

A contract may be discharged before any breach of its provisions has occurred, first, by the agreement of all parties thereto; secondly, for impossibility of performance; and, thirdly, in consequence of the bankruptcy, since the making of the contract, of one of the parties thereto. Discharge of the contract by agreement may take any of the following forms:—(1) Simple and express waiver or abandonment of the contract; (2) implied waiver by entering into a new contract inconsistent with the performance of the old; (3) non-fulfilment of some condition imposed by mutual assent and taking effect either as a condition precedent to the existence of the contract or as a condition subsequent annulling it; and (4) rescis-

(*a*) Above, pp. 739 *sq.*

(*b*) Above, p. 1.

sion in exercise of an express proviso in that behalf contained in the contract.

Discharge by agreement. 1. Express waiver.

With regard to the first of these forms of discharge by mutual assent, so long as a contract remains executory on both sides, consisting of mutual promises only, it may be discharged, before breach, by the parties' simple agreement to waive performance of, or to abandon, the contract (*c*). In this case each exonerates the other from the performance of his part of the contract in consideration of receiving the like exoneration himself; so that the release of each by the other is given for valuable consideration (*d*). And the oft-cited statement that "a simple contract may, before breach, be waived or discharged, without a deed and *without consideration*" (*e*), can only be accepted as applying to a contract wholly executory, and with the qualification that "without consideration" must be taken to mean "without *other* consideration than is implied in the *mutual* abandonment of the contract" (*f*). Where the contract has been executed on one side, it appears that, as a rule, the party who still remains under obligation can only be released by agreement to that effect when made under seal or for valuable consideration; and a promise or assurance of release given without consideration, either in words or unsealed writing, is of no effect (*g*). The only exception to this rule occurs in the case of bills of exchange and promissory notes, which may be discharged by the holder's absolutely and unconditionally renouncing, at or after maturity, his rights against the acceptor or maker, provided that the renunciation be in writing, or the bill or note be delivered up to the acceptor or maker thereof (*h*).

Bills and notes.

(*c*) *Price* v. *Dyer*, 17 Ves. 356, 364; *Robinson* v. *Page*, 3 Russ. 114, 119; *Goss* v. *Nugent*, 5 B. & Ad. 58, 65, 66; *Vezey* v. *Rashleigh*, 1904, 1 Ch. 634, 636; *Morris* v. *Baron & Co.*, 1918, A. C. 1; *British and Beningtons, Ld.* v. *N. W. Cachar Tea Co.*, 1923, A. C. 49, 69.

(*d*) See *King* v. *Gillett*, 7 M. & W. 55, 59; *Moore* v. *Crofton*, 3 Jo. & Lat. 438, 445; *Dobson* v. *Espie*, 2 H. & N. 79; *Morris* v. *Baron & Co.*, 1918, A. C. 1, 35.

(*e*) *Dobson* v. *Espie*, 2 H. & N. 79, 83; *Edwards* v. *Walters*, 1896, 2 Ch. 157, 161.

(*f*) The law is correctly stated by Parke, B., in *Foster* v. *Dawber*, 6 Ex. 839, 851: "It is competent for both parties to an executory contract by mutual agreement without any *satisfaction* to discharge the obligation of that contract."

(*g*) *Foster* v. *Dawber*, 6 Ex. 839, 851; *Edwards* v. *Walters*, 1896, 2 Ch. 157, 168; above, pp. 2, 3.

(*h*) Stat. 45 & 46 Vict. c. 61, ss. 62 (1), 89, adopting the rule laid down in *Foster* v. *Dawber*, 6 Ex. 839, but imposing the further

All simple contracts may be discharged, before breach, by a *parol* agreement of waiver or abandonment, if made for valuable consideration (including mutual exoneration in the case of executory contracts); and it is now settled by the highest authority that this rule applies not only to contracts governed by the Common Law, but also to those required by statute to be put in writing (*i*). But such an agreement, being itself a contract, must be established by as clear evidence as would be required to prove the formation of any other parol contract (*k*). With regard to special contracts, the common law rule was that a covenant could not be discharged, before breach, by any agreement made between the covenantor and covenantee for valuable consideration, but without deed (*l*), although in all other respects than as operating to discharge the covenant, the new agreement was valid and enforceable as an independent parol contract (*m*). In equity, however, it was established that such an agreement should amount to a valid discharge, and the covenantee would thereafter be relieved against any attempt by the covenantor to enforce the contract at law (*n*). Since the commencement of the Judicature Acts it has been decided that in this respect the rule of equity shall prevail (*o*). The result appears to be that there is now no difference between simple and special contracts as regards the manner or form of their discharge prior to breach; and that a contract for the sale of land may be discharged, before breach, by an express parol agreement of waiver or abandonment, if made for valuable consideration, whether the memorandum of the contract were signed only or executed under seal.

Simple contracts.

Contracts required to be put in writing.

Special contracts.

Discharge before breach of contracts to sell land.

requisite of writing or delivery up of the document: see *Edwards* v. *Walters*, 1896, 2 Ch. 157.

(*i*) *Goman* v. *Salisbury*, 1 Vern. 240; *Davis* v. *Symonds*, 1 Cox, 402, 406; *Noble* v. *Ward*, L. R. 1 Ex. 117, 2 Ex. 135, 137, as to the contract of Aug. 12; *Morris* v. *Baron & Co.*, 1918, A. C. 1; and cases cited above, p. 976, n. (*c*); see Sug. V. & P. 167, 168; Benjamin on Sale, 159, 2nd ed.

(*k*) *Carolan* v. *Brabazon*, 3 Jo. & Lat. 200, 209; *Moore* v. *Crofton*, ib. 438, 445; *Clifford* v. *Kelly*, 7 Ir. Ch. Rep. 333; *Cartan* v. *Bury*, 10 Ir. Ch. Rep. 387, 400; *Whittaker* v. *Fox*, 14 W. R. 192; *Harrison* v. *Brown*, 14 W. R. 193, n.; Sug. V. & P. 167.

(*l*) *Heard* v. *Wadham*, 1 East, 619; *Kaye* v. *Waghorn*, 1 Taunt. 428; *Brymer* v. *Thames, &c. Ry. Co.*, 2 Ex. 549, 5 Ex. 696; *Mayor of Berwick* v. *Oswald*, 1 E. & B. 295; *Spence* v. *Healey*, 8 Ex. 668.

(*m*) *Nash* v. *Armstrong*, 10 C. B. N. S. 259.

(*n*) *Lanesborough* v. *Ockshott*, 1 Bro. P. C. 151; *Hill* v. *Gomme*, 1 Beav. 540, 5 My. & Cr. 250; *Webb* v. *Hewitt*, 3 K. & J. 438.

(*o*) *Steeds* v. *Steeds*, 22 Q. B. D. 537.

2. Implied waiver.

A contract may also be discharged, before breach, by implied waiver, that is, by the parties entering into a new contract inconsistent with the performance of the old; as if A. contract to sell Blackacre to B. for 1,000*l.*, and it be agreed between them, before breach, that C. shall be the purchaser instead of B. (*p*); or that B. shall take Whiteacre instead. But in order that a new agreement may operate as an implied waiver of a pre-existing contract, its terms must be inconsistent with the performance of the earlier contract; it must be such as can only be carried out by the entire abandonment of the old agreement. A mere alteration of some term or terms of the old contract is not sufficient (*q*). Besides this, the new agreement must be perfectly valid and enforceable at law (*r*), or at least, in equity. For example, if A. sell Blackacre to B. for 1,000*l.*, the sale to be completed at one month's date, and before breach it be agreed in writing, duly signed, that the price shall be 950*l.*, or that two-thirds of the purchase money shall be left on mortgage, or that an inferior title to that stipulated for shall be shown, or that the time for completion shall be extended to six weeks, the other obligations under the contract are not discharged (*s*), although it is true that from one point of view they may be regarded as incorporated in an entirely new agreement (*t*).

A contract, invalid for want of writing, cannot be set up as an implied waiver of a prior contract.

And if, after such a contract, but before breach, the parties *orally* agree that C. shall be the purchaser instead of B., or that Whiteacre shall be substituted for Blackacre, it appears that the original contract still remains undischarged, and may be specifically enforced on either side. For, as we have seen (*u*),

(*p*) *Moore* v. *Marrable*, L. R. 1 Ch. 217, 222.

(*q*) *Price* v. *Dyer*, 17 Ves. 356; *Robinson* v. *Page*, 3 Russ. 114; *Vezey* v. *Rashleigh*, 1904, 1 Ch. 634; *Morris* v. *Baron & Co.*, 1918, A. C. 1, 16, 18; *British and Beningtons, Ld.* v. *N. W. Cachar Tea Co.*, 1923, A. C. 48; see also *Goss* v. *Nugent*, 5 B. & Ad. 58; *Harvey* v. *Grabham*, 5 A. & E. 61; *Stowell* v. *Robinson*, 3 Bing. N. C. 928.

(*r*) *Stead* v. *Dawber*, 10 A. & E. 57; *Marshall* v. *Lynn*, 6 M. & W. 109; *Moore* v. *Campbell*, 10 Ex. 323; *Noble* v. *Ward*, L. R. 2 Ex. 135; *Morris* v. *Baron & Co.*, 1918, A. C. 1, 11-13, 16-18, 23-27, 31, 38-40; *British and Beningtons, Ld.* v. *N. W. Cachar Tea Co.*, 1923, A. C. 48, 56, 57, 61, 62, 67-69. These are cases relating to the 17th section of the Statute of Frauds, now replaced by sect. 4 of the Sale of Goods Act, 1893: but their principle is equally applicable to cases governed by the 4th; see preceding note; *Marshall* v. *Lynn*, 6 M. & W. 109, 117; and the two cases last above cited. The statements in Fry, Sp. Perf. § 1039, 3rd ed. and 4th ed., appear to have been made in ignorance of the above previous decisions.

(*s*) See note (*q*), above.

(*t*) See note (*r*), above.

(*u*) Above, p. 3.

the law requires all contracts for the sale of land to be put in writing and signed by the party to be charged, or else they shall not be enforced. Parol evidence is therefore inadmissible to prove the new agreement for what it purports to be, that is, a new contract inconsistent with the performance of the old. And it has been decided that in such case the new agreement shall not be put in evidence, without signed writing, to establish an implied parol waiver of the old contract (*x*). If, however, the new agreement were specifically enforceable in equity under the doctrine of part performance (*y*), it is thought that, according to the present law and practice, it would effectively operate as a discharge of the old contract, and might, for that purpose, be proved by oral evidence (*z*). And if by express provision or necessary implication it be one of the terms of the new agreement that the old contract shall be abandoned, that term (being in effect an express waiver (*a*)) may be proved by parol evidence and enforced, although the other terms may not (*b*). So also if, after making the contract but before breach, the parties agree by word of mouth to alter some term or terms only of the contract, the obligation of the contract is not in any way discharged, and either party may enforce specific performance of the contract in its original form (*c*). For all the terms of an agreement for the sale of land must be put into writing and signed in order to satisfy the Statute of Frauds (*d*); so any alterations in such terms must necessarily assume the same form (*e*). And the doctrine of setting up a parol variation in

If waiver of the old be a term of the new contract, it may be proved by parol.

All *alterations* of a contract for sale of land must be put in writing and signed.

(*x*) See note (*r*), above, p. 978. This is the case even though the new agreement constituted by the original agreement (required to be in writing) and a parol variation would not in itself (if made by one original contract) be required to be in writing. For example, where the original agreement was not to be performed within a year, but the new agreement is for less than a year, it appears that parol evidence cannot be given of the variation; see *Morris* v. *Baron & Co.*, 1918, A. C. 1, 19-21, 25, 26, disapproving of *Williams* v. *Moss' Empires, Ld.*, 1915, 3 K. B. 242. But mere forbearance by one party at the request of the other to require compliance with a term of the contract does not constitute a variation of the contract; *Levey & Co.* v. *Goldberg*, 1922, 1 K. B. 688.

(*y*) Above, p. 12.

(*z*) See above, p. 977, and n. (*o*).

(*a*) Above, pp. 976, 977.

(*b*) *Noble* v. *Ward*, L. R. 1 Ex. 117, 2 Ex. 135, as to the contract of Aug. 12; *Morris* v. *Baron & Co.*, 1918, A. C. 1. See *Addenda*.

(*c*) See above, p. 978, and n. (*q*).

(*d*) Above, pp. 3, 4.

(*e*) See cases cited in n. (*r*) to p. 978, above; *Robson* v. *Collins*, 7 Ves. 130, 133; *Morris* v. *Baron & Co.*, 1918, A. C. 1, 16, 18; *British and Beningtons, Ld.* v. *N. W. Cachar Tea Co.*, 1923, A. C. 48, 57, 62.

defence to an action for specific performance (*f*) applies only where the term orally agreed upon is assented to at the time of, and not after, the formation of the written contract (*g*). But where a parol agreement made after the execution and varying the terms of a written contract to sell land has been so acted upon that it would be fraudulent or unfair to insist on the original contract, the variation may be asserted as a defence to an action for specific performance of the contract contained in the memorandum (*h*). And the contract, as so varied, may be decreed to be specifically enforced, if the acts of part performance have been sufficient to satisfy the equitable doctrine in that behalf (*i*).

Parol variation may be effectual where there is part performance.

3. Discharge by non-fulfilment of a condition.

A pure condition.

A third form of discharge of a contract, before breach, by mutual assent is where the contract has been made subject to the fulfilment of some condition precedent or subsequent, and this condition is not fulfilled. Here we are speaking of a condition pure and simple, of which the fulfilment is not warranted by either party; so that no cause of action for damages can arise from any breach thereof. Examples of a condition precedent are where it is agreed that, if a field shall be found, on measurement, to contain three acres at least, or if the drains of a house shall be tested and certified to be in good order, or if a house shall be put into good repair (*k*), or if a railway bill in Parliament shall pass (*l*), or a railway shall be made (*m*), the field or house or some land on the proposed line of railway shall be sold; or where an option to purchase land is given to be exercised by giving some specified notice within a limited time (*n*), or where A. agrees to sell part of Blackacre to B., if he (A.) can, within one year, purchase Blackacre from C. (*o*), or where A. agrees to sell lands to B. at a price to be fixed by

Condition precedent.

(*f*) Above, p. 775.

(*g*) See cases cited above, n. (*q*) to p. 978; Fry, Sp. Perf. § 809, 3rd ed.

(*h*) *Legal* v. *Miller*, 2 Ves. sen. 299; *Price* v. *Dyer*, 17 Ves. 356, 364.

(*i*) 5 Vin. Abr. 522, pl. 38; Sug. V. & P. 165; Fry, Sp. Perf. § 1038, 3rd ed.; above, p. 12.

(*k*) *Counter* v. *Macpherson*, 5 Moo. P. C. 83.

(*l*) *Hawkes* v. *Eastern Counties Ry. Co.*, 1 De G., M. & G. 737, 5 H. L. C. 331.

(*m*) *Gage* v. *Newmarket Ry. Co.*, 18 Q. B. 457.

(*n*) Above, p. 509, n. (*t*); *Bruner* v. *Moore*, 1904, 1 Ch. 305.

(*o*) See *Wylson* v. *Dunn*, 34 Ch. D. 569, 577, 578.

a certain valuer, or two valuers or their umpire (*p*). In these cases there is no enforceable contract of sale until the condition has been fulfilled; and, on failure of the condition, all obligation between the parties is at an end (*q*). Instances of a condition subsequent are where some land is sold by an agreement which stipulates for immediate payment of a deposit and investigation of title or delivery of possession, but is to be annulled if some contemplated application to the Court be refused, or some bill in Parliament be thrown out next session, or water be not found on boring for it; or where, by a similar agreement, fixing a future day for completion, an equity of redemption is sold subject to the mortgagee's consenting to allow the mortgage to remain for a certain term (*r*), or leaseholds not assignable without the lessor's consent are sold subject to such consent being obtained (*s*). Other examples are where the agreement is to be void if the purchaser's counsel shall be of opinion that a marketable title cannot be made by the time fixed for completion (*t*); or where a plot of land is sold subject to the purchaser's solicitor's approval of the title *and restrictions* (*u*); or where leaseholds are sold subject to the condition that the purchaser's solicitor shall approve the title to the lease *and to the freehold* (*v*); or where by a contract definitely concluded any land is sold subject to the express condition that the title shall be approved by the purchaser's solicitor (*x*). Here a valid contract is at first formed, but is discharged on non-fulfilment of the condition. In cases like these, the vendor does not warrant the fulfilment of the condition; but he is bound, so far as the performance thereof rests with himself, honestly to use his best endeavours to procure fulfilment, and will be liable to substantial damages for a breach of this duty (*s*). And, in the absence of stipulation to the contrary, he has all the time until the day fixed for completion to procure fulfilment of the condition (*r*). It is obvious that the occurrence of the same event

Condition subsequent.

(*p*) Above, p. 55.
(*q*) *Regent's Canal Co.* v. *Ware*, 23 Beav. 575, 586; *Scott* v. *Liverpool Corpn.*, 3 De G. & J. 334; *Modlen* v. *Snowball*, 29 Beav. 641, affirmed 31 L. J. Ch. 44; *Williams* v. *Brisco*, 22 Ch. D. 441.
(*r*) *Smith* v. *Butler*, 1900, 1 Q. B. 694.
(*s*) *Day* v. *Singleton*, 1899, 2. Ch. 320; above, pp. 348-350.
(*t*) *Williams* v. *Edwards*, 2 Sim. 78, 83.
(*u*) *Marten* v. *Whale*, 1917, 1 K. B. 544, 548.
(*v*) See *Von Hatzfeldt-Wildenburg* v. *Alexander*, 1912, 1 Ch. 284, 289, 290; above, p. 19, n. (*l*).
(*x*) See above, p. 19, n. (*l*), and cases there cited.

may form a condition precedent or subsequent according to the intention of the parties as expressed in the terms constituting the whole contract (*y*).

4. Exercise of a proviso for rescission. Power to vendor to rescind in case of an unwelcome requisition.

Lastly, a contract may be discharged, before breach, by mutual assent on the exercise of an express power reserved to either party to rescind the agreement. An instance of this occurs in the power commonly inserted in contracts to sell land and enabling the vendor to rescind the contract if the purchaser shall insist on any objection or requisition which he is unable or unwilling to comply with (*z*). And an express power for the vendor to re-sell the land, in case of the purchaser's non-compliance with the terms of the contract (*a*), implies an agreement that, on the exercise of this power, the contract shall be rescinded (*b*). Sometimes a power is reserved for the purchaser to rescind if the vendor shall not erect some houses or buildings within a specified time (*c*).

Whether parties are entitled to *restitutio in integrum* where a contract partly performed is discharged by mutual consent.

When a contract which has been partly performed is discharged before breach by mutual agreement, the questions, whether matters are to remain as they are, or whether the parties are entitled to be restored wholly or partly to their former position, can only be solved by reference to the terms of the agreement. It is usual to provide particularly for this, where a contract is expressly made voidable on the non-fulfilment of some condition subsequent, or where an express power to rescind the contract is given (*d*). Where it has been agreed, as a term of a contract intended to be immediately performed, in whole or in part, that it shall be *annulled* on non-fulfilment of some condition subsequent, it is thought that, in the absence of stipulation to the contrary, the parties would be impliedly entitled to *restitutio in integrum* (*e*), as in the case of rescission for

(*y*) *Acherley* v. *Vernon*, Willes, 153, 156, 157; *Hotham* v. *East India Co.*, 1 T. R. 638, 645; 2 Jarm. Wills, 1470, 1471, 6th ed.
(*z*) Above, pp. 58, 65, 84, 158, 171-176, 684.
(*a*) Above, pp. 62, 63, 67.
(*b*) Above, p. 50, n. (*m*).
(*c*) *Whitbread & Co.* v. *Watt*, 1902, 1 Ch. 835.
(*d*) Above, pp. 65, 349; and see previous note.
(*e*) *Elliott* v. *Crutchley*, 1904, 1 K. B. 565, 569, affirmed, 1906, A. C. 7. Thus at common law, after a sale of goods, conditioned to be annulled if the goods sold be not of a certain quality, the purchaser is at liberty to return the goods on ascertaining that they are not of the quality stipulated; *Bannerman* v. *White*, 10 C. B. N. S. 844; above, p. 791.

innocent misrepresentation (*f*); for the rule is that the *rescission* of a voidable contract cannot take place without entire restitution (*g*). Thus, if a contract be made for the present sale of land, providing for immediate payment of a deposit or further sum on account of the purchase money and for entry into possession, and conditioned to become *void* on the refusal of some contemplated application to the Court or on failure to find water or gold there, it is thought that, on the occurrence of the avoiding event, the vendor would have to return the money paid on account of the purchase money, with interest, and the purchaser to give up possession of the land, and to account for any rents or profits received by him (*h*), and to return the abstract of title (*i*); and each would have to bear his own expenses incurred in connection with the contract, as of investigating the title. But, as we shall see, it is otherwise if the agreement be, not that the contract shall be avoided *ab initio*, but that its further performance shall be dispensed with. This brings us to the subject of discharge for impossibility of performance.

Impossibility of performance.

A contract for the sale of land may be discharged, before breach, on the ground of impossibility of performance. This form of discharge is perhaps no more than a species of discharge by mutual assent on failure of a condition subsequent; it is the

(*f*) Above, pp. 815-817.

(*g*) *Clough* v. *London and North Western Ry. Co.*, L. R. 7 Ex. 26, 37; *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, 1899, 2 Ch. 392, 423; *Harrison* v. *Holland*, 1921, 3 K. B. 297, 1922, 1 K. B. 211; above, pp. 811, 815 *sq.*, 830, 972. It is submitted that this rule was overlooked by Cozens-Hardy, J., in *Cornwall* v. *Henson*, 1899, 2 Ch. 710, reversed on another point, 1900, 2 Ch. 298, where he decided that, on a contract to sell land for a price payable by instalments, the vendor *rescinding* the contract for the purchaser's renunciation of it (see below, pp. 1000-1002) before payment of the last instalment was nevertheless entitled to retain all the instalments already paid. It became unnecessary to review this decision in the Court of Appeal, but the Court very plainly intimated their doubts of its correctness; 1900, 2 Ch. 302, 305. The rule in *Whincup* v. *Hughes*, L. R. 6 C. P. 78, to which Cozens-Hardy, J., applied as the general rule (1899, 2 Ch. 715), was that applicable in the case, not of *rescission* of the contract, but of its discharge for impossibility of performance. In such case the contract is not rescinded; the parties are simply excused from further performance; below, pp. 984-986.

(*h*) Above, p. 815, and n. (*u*).

Return of the abstract on rescission.

(*i*) The abstract must be returned by the purchaser whenever the contract is rescinded from any cause, whether in pursuance of an express power in that behalf or otherwise, and whether before or after breach; and the purchaser is not entitled in such case to keep any copy of it; see *Roberts* v. *Wyatt*, 2 Taunt. 268, 278; Sug. V. & P. 428.

impossibility, not so much of performing the contract as of fulfilling the condition on which alone it was to be carried out, that is the ground of release (*j*). But this kind of discharge only occurs where the parties have not expressly contemplated or provided for the event of failure of the condition, so that their assent to the discharge is purely an implication of law (*k*); and it may therefore be conveniently considered by itself. Discharge by impossibility of performance is illustrated where a particular thing is sold for delivery on a future day, subject to the implied condition, pure and simple (*l*), that it shall then be in existence, and before that day the thing is destroyed without the vendor's fault. In this case the contract is discharged; for it is intended, by implication of law, that in case the necessary condition of performing the agreement be rendered impossible of fulfilment without the parties' fault, they shall be excused from carrying out their mutual undertaking (*m*). We have seen (*n*) that, as a rule, the estate in land sold belongs in equity to the purchaser, and the property stands at his risk, as from the date of the agreement to sell; and in consequence of this rule the obligation of the contract is not discharged by the practical destruction, pending completion, of the thing sold: but the agreement may nevertheless be specifically enforced (*o*). If, however, land be sold subject to the express or implied condition, not warranted to be fulfilled, that the land shall be delivered over on completion in some particular state, the proviso is impliedly annexed, that if without the vendor's fault it shall become impossible for him to deliver possession of the land in that state, the further performance of the contract shall be excused (*p*). Thus, if a theatre, music-hall, hotel, public-house,

(*j*) See Benjamin on Sale, 455, 456, 2nd ed.

(*k*) *Elliott* v. *Crutchley*, 1904, 1 K. B. 565, 568-570, affirmed, 1906, A. C. 7.

(*l*) Above, p. 980.

(*m*) *Taylor* v. *Caldwell*, 3 B. & S. 826; *Howell* v. *Coupland*, 1 Q. B. D. 258; above, p. 482, n. (*s*). As to discharge of contract through impossibility arising out of war, see *Re Shipton, Harrison & Co. and Harrison Bros. & Co.'s Arbitration*, 1915, 3 K. B. 676; *Horlock* v. *Beal*, 1916, 1 A. C. 486, 496 *sq.*; *Bank Line, Ld.* v. *Arthur Capel & Co.*, 1919, A. C. 435; *Ertel, Bieber & Co.* v. *Rio Tinto Co.*, 1918, A. C. 26; *Metrop. Water Board* v. *Dick, Kerr & Co.*, 1917, 2 K. B. 1, affirmed, 1918, A. C. 119; and for an account of the development of this doctrine, see the judgment of McCardie, J., in *Blackburn Bobbin Co.* v. *T. W. Allen & Sons*, 1918, 1 K. B. 540, 543-5, 547-8.

(*n*) Above, pp. 480-483.

(*o*) Above, p. 482.

(*p*) See *Taylor* v. *Caldwell*, 3 B. & S. 826, 833, 834; *Appleby* v.

or shop were sold with possession to be given on a future day fixed for completion (*q*), on condition (without warranty) that the premises should be delivered over in a fit state for giving performances or carrying on business therein; or if the vendor had agreed to erect some buildings on the land sold by the day fixed for completion, time being of the essence of the contract, and the premises or buildings were accidentally burnt down a few days before the time for completion, the parties would be discharged from further performance of the contract (*r*). And the same doctrine is applicable, not only where it is an essential term of the contract that the property sold shall be handed over on completion in its existing state or in some other particular state, but in every other instance where land is sold subject to some condition, which is contemplated but not warranted to be fulfilled at the time of completion, and before completion the fulfilment of this condition is rendered impossible by some extraneous cause beyond the control of the parties themselves (*s*). Thus, if a house were sold on the express or implied condition that the King's coronation procession should pass in front of its windows on the day after that fixed for completion, and before completion the King were to die or the route of the procession were to be altered by authority, the contract would be discharged for impossibility of performance (*t*). Where a condition of this kind is not plainly expressed, the question, whether it is to be implied, must be determined by reference to the terms of the whole contract and the circumstances of the case (*u*).

The doctrine is applicable to any condition subject to which land is sold, and which becomes an impossible condition.

Similarly, a contract may be discharged where its performance is rendered impossible owing to the intervention of the law (*v*). Thus, if it were a term of a contract to sell a house that the vendor should enter into covenants restrictive of the use of some adjoining land of his, and the sale were completed and

Impossibility of performance owing to the intervention of the law.

Myers, L. R. 2 C. P. 651; *Robinson* v. *Davison*, L. R. 6 Ex. 269; *Howell* v. *Coupland*, 1 Q. B. D. 258; *Nickoll & Knight* v. *Ashton, Edridge & Co.*, 1901, 2 K. B. 126.

(*q*) See above, pp. 464, 544.

(*r*) *Counter* v. *Macpherson*, 5 Moore, P. C. 83, 104, 105; *Taylor* v. *Caldwell*, 3 B. & S. 826.

(*s*) Above, n. (*p*).

(*t*) *Krell* v. *Henry*, 1903, 2 K. B. 740.

(*u*) Cf. *Herne Bay, &c. Co.* v. *Hutton*, 1903, 2 K. B. 683, with *Krell* v. *Henry*, ib. 740.

(*v*) See above, pp. 843, 844.

the covenants entered into accordingly, and afterwards the adjoining land were taken by a railway company under their parliamentary powers, the vendor would be discharged from all further liability on the covenants by reason of the impossibility of performance, the land having been handed over by a cause beyond his control to a body not bound by the covenants (*x*). Suppose, however, that the house or the adjoining land were taken by the railway company after the formation of the contract but before its completion (*y*), the case would be governed by the general rule (*z*), unless the continued existence *in statu quo* of the whole property sold up to the time for completion were an essential condition of the sale. If not, the purchaser would have to pay the whole purchase money and take a conveyance of the property in its altered condition, but he would be entitled to compensation from the railway company in respect of his equitable estate or interest in the land compulsorily taken (*a*). Where it is an essential condition of the sale that the property shall be conveyed in its existing state, it appears that the contract will be discharged, if before completion the whole or any part thereof be taken away compulsorily under parliamentary powers.

Position of the parties where a contract partly performed is discharged for impossibility of performance.

When the obligation to carry out a contract partly performed is discharged in this way for impossibility of performance, the parties (in the absence of stipulation to the contrary) are not entitled to be restored to their former position, but are left to remain as they are, as in the case of an illegal or a void contract partly executed (*b*); and any money paid or property transferred under the contract previously to the discharge so caused

(*x*) *Baily* v. *De Crespigny*, L. R. 4 Q. B. 180; and see *Kirby* v. *School Board for Harrogate*, 1896, 1 Ch. 437; above, p. 468, n. (*x*).

(*y*) For the purpose of ascertaining the time at which lands are taken under the Lands Clauses Act, 1845, the crucial date is that of service of the notice to treat; *Mercer* v. *Liverpool, &c. Ry. Co.*, 1903, 1 K. B. 652, 1904, A. C. 461; *Dawson* v. *Great Northern, &c. Ry. Co.*, 1904, 1 K. B. 277, 278, n., 1905, 1 K. B. 260, 273.

(*z*) Above, p. 984.

(*a*) See *Martin* v. *London, Chatham & Dover Ry. Co.*, L. R. 1 Ch. 501; *Re King's Leasehold Estates*, L. R. 16 Eq. 521; *Furness Ry. Co.* v. *Cumberland, &c. Bdg. Socy.*, 52 L. T. 144, 146; *Birmingham, &c. Land Co.* v. *London & North Western Ry. Co.*, 40 Ch. D. 268; *Long Eaton, &c. Co.* v. *Midland Ry. Co.*, 1902, 2 K. B. 574. A right to compensation under the Lands Clauses Act, 1845, for one's lands being injuriously affected is assignable; *Dawson* v. *Great Northern, &c. Ry. Co.*, 1905, 1 K. B. 260.

(*b*) Above, pp. 838, 840.

cannot be recovered back (*c*). But obligations arising from the *breach* prior to this discharge of some part of the contract are unaffected and remain enforceable (*d*). Thus, if a music-hall be sold with possession to be given on a future day, on condition that it shall then be in a fit state for giving performances therein, a deposit of 20 per cent. of the purchase money to be paid to the vendor on signing the contract, and the deposit be paid and the house be accidentally burnt down before the day for completion, the parties would be discharged from further performance of the contract (*e*); but the vendor would be entitled to retain the deposit. And if the deposit had not been paid as agreed, the vendor would be entitled to sue for it (*e*). If in such a case the deposit were paid to a third person as stakeholder pending completion, it is thought that, on the discharge of the contract for impossibility of performance, the purchaser would be entitled to recover it (*f*). Where the parties have in effect expressly stipulated that, in case of the impossibility of fulfilling the condition, the contract shall be rescinded *ab initio*, it appears that they would be impliedly entitled to *restitutio in integrum* (*g*).

Discharge in consequence of bankruptcy since the contract.

1. Disclaimer by the trustee.

Discharge of the obligation of a contract, before breach, may also be effected in consequence of the bankruptcy since the formation of the contract of one of the parties thereto. This may take place (1) by the disclaimer of the contract, as unprofitable, by his trustee in the bankruptcy; when the liability of the bankrupt and of the trustee under the contract is determined, but the other party is deemed to be a creditor of the bankrupt to the extent of the injury he suffers by the operation of the disclaimer, and may prove the same as a debt in the bankruptcy (*h*). (2) By the rescission of the contract by order of the Court, which may be made in the bankruptcy on the

2. Rescission by the order of the Court in Bankruptcy.

(*c*) *Civil Service Co-op. Socy.* v. *General Steam Navigation Co.*, 1903, 2 K. B. 756; and see *De Silvale* v. *Kendall*, 4 M. & S. 37; *Byrne* v. *Schiller*, L. R. 6 Ex. 319.

(*d*) *Chandler* v. *Webster*, 1904, 1 K. B. 493.

(*e*) Above, p. 985.

(*f*) It is thought that this case is parallel to that of money paid to a stakeholder to be applied under an illegal or a void contract, which is not performed; above, pp. 840, 841.

(*g*) Above, p. 982, and n. (*e*).

(*h*) Stat. 4 & 5 Geo. V. c. 59, s. 54 (1, 2, 8), replacing 46 & 47 Vict. c. 52, s. 55 (1, 2, 7); *Re Hooley*, 1899, 2 Q. B. 579; see above, pp. 516-519, 523, 525-527.

other party's application, and on such terms as to the Court may seem equitable, and under which any damages made payable to the other party may be proved by him as a debt in the bankruptcy (*i*). (3) By the effect of a composition or scheme of arrangement accepted and approved by the Court under the Bankruptcy Act, 1914 (*j*). And (4) by the operation of an order of discharge obtained by the bankrupt (*k*). As we have seen, in the case of a contract to sell land, the purchaser's liability to pay the price may be disclaimed by his trustee in bankruptcy, and will be extinguished by an order for his discharge (*l*); and in either of these cases the vendor is discharged from his obligation to convey, to the performance of which the payment of the price is a condition precedent (*m*). But the vendor's obligation to convey the land sold, so far as it is capable of being specifically enforced in equity, cannot, as a rule, be disclaimed in his own bankruptcy (*n*), and is not released by an order made therein for his discharge (*o*).

3. Composition or scheme of arrangement approved by the Court.

4. Order of discharge.

Discharge of the contract by performance.

A contract is discharged by performance of the obligations thereby undertaken; and each particular obligation of the contract is discharged by its performance in due course. Thus, we have seen that, on a sale of land, when the vendor has, by furnishing the proper abstract and producing the right evidence in support of it, shown a good title according to the contract, the purchaser is bound to accept the title (*p*). And when, after acceptance of the title, the vendor has duly conveyed the land sold pursuant to the contract, and the purchaser has paid the price, the parties are, as a rule, discharged from all the obligations of their contract of sale; for nothing else remains to be done on either side (*q*). But the completion of a contract for

Discharge on completion.

(*i*) Stat. 4 & 5 Geo. V. c. 59, s. 54 (5), replacing 46 & 47 Vict. c. 52, s. 55 (5); above, p. 526.

(*j*) Stat. 4 & 5 Geo. V. c. 59, s. 16 (13), replacing 53 & 54 Vict. c. 71, s. 3 (12); above, p. 517, and n. (*q*).

(*k*) Stat. 4 & 5 Geo. V. c. 59, ss. 28, 30, replacing 46 & 47 Vict. c. 52, ss. 30, 37; *Barnett* v. *King*, 1891, 1 Ch. 4; above, p. 517.

(*l*) Above, pp. 517, 523.

(*m*) Above, p. 546.

(*n*) Above, p. 517.

(*o*) Above, p. 517; *Re Reis*, 1904, 2 K. B. 769, 777, 781, 787.

(*p*) Above, pp. 34, 43, 149, 152, 543, 546; and see *Soper* v. *Arnold*, 37 Ch. D. 96, 14 App. Cas. 429, stated above, p. 547, where the purchaser, through his legal adviser's inadvertence, expressly accepted a title which was bad on the face of the abstract. Cf. above, pp. 169-171.

(*q*) Above, pp. 545, 575, 608, 613, 614, 683, 795-797.

the sale of land, by conveyance and payment of the purchase money, does not necessarily operate as a discharge of every liability arising under the parties' agreement. If the contract contain any stipulation, which is collateral to the main duties of proving title, conveyance and payment, the obligation so incurred is not discharged by the performance of those duties. Thus, an express promise contained in the contract to compensate for errors of description (*r*), and a warranty of quality (*s*), remain enforceable after the sale has been completed. So, also, a collateral agreement that the purchaser, his heirs and assigns, shall observe restrictions in the use of the land sold, or that the vendor and his successors in estate shall observe restrictions in the use of other land, or that the purchaser shall build a house or wall, or erect a fence on the land sold, or keep an adjoining road in repair (*t*), is not discharged by conveyance (*u*). It appears, too, that where there has been a breach, before completion, of some obligation implied by law in the contract of sale, but collateral to the main duties thereby undertaken, the liability for this breach is not discharged by conveyance of the land sold in exchange for payment of the price. Thus, it has been held that the purchaser may maintain an action against the vendor, after completion, for breach of the vendor's implied obligation to take proper care of the land sold in the interval between the date of the contract and that of completion (*x*). And it seems that the same principle should be applicable in case of the vendor's breach of his implied obligation to discharge the outgoings up to the day fixed for completion (*y*). It is thought that an obligation, express or implied, may be said to be collateral to the main duties arising under the contract when it is of such a nature that it cannot reasonably be supposed that the parties intend it to be extinguished by performance of those duties (*z*).

Completion may not discharge every obligation of the contract.

Collateral stipulation.

Express agreement to compensate for errors.

Warranty of quality.

Collateral agreement restrictive of the use of land or to lay out money thereon.

Breach of an implied collateral obligation.

Breach of vendor's duty to take care of the land sold;

or to discharge the outgoings.

Where the contract contains some collateral stipulation, which is directed or may be required to be inserted in the deed of

Variation or omission of collateral

(*r*) *Palmer* v. *Johnson*, 13 Q. B. D. 351; above, pp. 60, 575, 680-683.

(*s*) *De Lassalle* v. *Guildford*, 1901, 2 K. B. 215; above, pp. 575, 754, 755, 759, 794, 798, 802, n. (*t*).

(*t*) See above, pp. 467-471.

(*u*) Above, pp. 470, 471, 608, 609, and cases there cited.

(*x*) *Clarke* v. *Ramuz*, 1891, 2 Q. B. 456; above, pp. 488, 498, n. (*x*).

(*y*) Above, pp. 489, 496, 498, and n. (*x*).

(*z*) See cases cited in notes (*r*), (*s*), (*x*), above.

stipulation intended to be inserted in the conveyance.

conveyance, such as a stipulation restrictive of the use of the land sold or other land (*a*), and the stipulation is by mutual mistake modified in or omitted from the conveyance, the party injured thereby is entitled in equity to have the deed of conveyance rectified accordingly and to obtain at once the same relief, in the way of injunction or otherwise, as if the deed had duly expressed the parties' true intention (*b*). But where the parties have by agreement subsequent to the contract modified their original intention, and the deed of conveyance truly expresses their intention as so modified, there is no case for rectification (*c*); and since the parties have expressed their true intention in the deed, it is no objection that the agreement modifying their original intention was not otherwise put into writing (*d*). If, however, other persons than the vendor and purchaser were in effect parties to the original contract, so that the vendor and purchaser alone have no power to modify its provisions, as where a building estate is sold in lots on the terms that all purchasers shall have the benefit of certain restrictive stipulations, then the vendor and any single purchaser can only vary the original contract as between themselves and their representatives or successors in estate, and remain bound by and can enforce the provisions of the original contract as regards all the other parties thereto (*e*).

Completion without payment of the price.

Vendor's lien.

Of course, completion of the purchase does not extinguish the contract of sale where it takes place, by the parties' arrangement, without payment of the whole or some part of the purchase money. In that case the amount unpaid remains owing to the vendor as a debt due upon the contract of sale (*f*); and the vendor has also an equitable lien on the land sold for the amount due, with interest thereon at the rate of 4*l*. per cent. per annum (*g*). This lien is no more than the continuance of that arising in equity on formation of the contract of sale (*h*);

(*a*) Above, pp. 608, 609, 624.
(*b*) Above, pp. 768 *sq.*, 773, 787, 788.
(*c*) Above, pp. 771, 773, 784, 785.
(*d*) See above, p. 979.
(*e*) *Rowell* v. *Satchell*, 1903, 2 Ch. 212; and see above, p. 474.
(*f*) Consider *Evans* v. *Tweedy*, 1 Beav. 55.
(*g*) *Chapman* v. *Tanner*, 1 Vern. 267; *Pollexfen* v. *Moore*, 3 Atk. 272; *Mackreth* v. *Symmons*, 15 Ves. 329.
(*h*) Above, pp. 481, 482, and n. (*n*); *Smith* v. *Hibbard*, 2 Dick. 730; *Topham* v. *Constantine*, Taml. 135; *Toft* v. *Stephenson*, 7 Hare, 1, 1 De G., M. & G. 28, 5 De G., M. & G. 735. The first and last of

the lien being allowed to remain in equity until payment, notwithstanding that the vendor has parted with the legal estate by conveyance, and that in the deed of conveyance the whole consideration money is expressed to have been paid (*i*). The vendor may, however, waive or abandon his lien for the unpaid purchase money, and his intention to do so may be either expressed or implied from the circumstances of the case. An express waiver or release of the lien presents no difficulty: but it must be made either by deed or for valuable consideration; for a gratuitous promise or assurance of waiver or abandonment of the lien appears to be of no avail, if not given under seal (*k*). As the benefit of the lien appears to be assignable by parol only, and to pass by an assignment, valid in equity, of the unpaid purchase money (*l*), it seems that an agreement for waiver or abandonment of the lien need not be put into writing, if made for valuable consideration. Where such waiver or abandonment is sought to be implied, the *onus* lies on those who deny the existence of the lien, which arises by the rule of equity in the absence of stipulation to the contrary; the question is one of the parties' intention, to be determined by the documents they have executed and the circumstances of the case; and the test is, whether they have in effect agreed that the vendor shall have some other security or mode of payment in substitution for his lien (*m*). For example, the vendor's lien

Waiver or abandonment of lien.

Express;

or implied.

these cases illustrate the enforcement of the vendor's lien, where the purchaser has been let into possession, but no conveyance has been executed.

(*i*) A receipt for the whole price in the body of the deed estopped the vendor from proving non-payment at common law; *Baker* v. *Dewey*, 1 B. & C. 704; *Harding* v. *Ambler*, 3 M. & W. 279; but not in equity; *Coppin* v. *Coppin*, 2 P. W. 291; *Wilson* v. *Keating*, 28 L. J. Ch. 895; *Re Stucley*, 1906, 1 Ch. 67, 79; and cases cited in last note but one. As all branches of the High Court now have equitable jurisdiction, such estoppel by deed *at law* has practically ceased to exist. An endorsed receipt (see above, pp. 651, 652, and nn. (*y*), (*z*), worked no estoppel either at law or in equity; at law it was only evidence for a jury, and might be rebutted; *Lampon* v. *Corke*, 5 B. & A. 606, 611, 612; *Re Stucley*, ubi sup.

(*k*) Above, pp. 3, 976; *Re Hancock*, 57 L. J. Ch. 793; *Edwards* v. *Walters*, 1896, 2 Ch. 157, 168, 172; and see Wms. Pers. Prop. 256, n. (*i*), 17th ed.

(*l*) *Dryden* v. *Frost*, 3 My. & Cr. 670, 672-674. The assignee takes subject to the purchaser's right to have the estate conveyed to him free from incumbrances, or otherwise as specified in the contract, and to all prior incumbrances created by the vendor on the land sold; *Lacey* v. *Ingle*, 2 Ph. 413; above, p. 454, n. (*z*).

(*m*) *Mackreth* v. *Symmons*, 15 Ves. 329, 340-350; *Winter* v. *Anson*, 3 Russ. 488, 490-492; *Parrott* v. *Sweetland*, 3 My. & K. 655; *Re*

is not in general affected by the fact that he has accepted the purchaser's bill of exchange or promissory note, or taken his bond for payment of the amount due, even though such payment be thereby postponed to a future day, or some other party join in the security as a surety for the purchaser's payment; for these are only modes of payment and are not a substitute for the lien (*n*). But if the sale were made on the terms of the purchaser's giving a bond for a certain sum to be void on the performance of a particular condition, so that the giving of the bond and not the payment of the sum thereby secured was the consideration for the conveyance, the vendor would have no lien (*o*). And an intention to exclude the vendor's lien has been implied where he took a mortgage of the land sold to secure a part of the unpaid purchase money (*p*), where he took a mortgage on part of the land to secure the whole sum remaining unpaid (*q*), where payment of the purchase money was to be secured by a transfer of stock redeemable on payment (*r*), and where payment of the price was to be made partly in shares of a company and partly out of moneys to be received by the company from the sale of shares or from loans made to them (*s*). The vendor has a lien, in the absence of stipulation to the contrary, where the price is payable by instalments (*t*), or the sale is made in consideration of the payment of an annuity (*u*): but not if the parties' intention appear to be that there shall be no such lien (*x*).

Lien on land taken under the Lands

Where land is taken by agreement or compulsorily under the Lands Clauses Act, 1845 (*y*), the vendor has the like lien

Albert, &c. Co., L. R. 11 Eq. 164, 178, 179; *Re Brentwood, &c. Co.*, 4 Ch. D. 562; 2 Dart, V. & P. 829, 6th ed.; 733, 7th ed.

(*n*) *Grant* v. *Mills*, 2 V. & B. 306; *Winter* v. *Anson*, 3 Russ. 488; *Collins* v. *Collins*, 31 Beav. 347.

(*o*) *Parrott* v. *Sweetland*, 3 My. & K. 655; *Dixon* v. *Gayfere*, 1 De G. & J. 655; and see *Clarke* v. *Royle*, 3 Sim. 499; *Re Albert, &c. Co.*, L. R. 11 Eq. 164, 178, 179.

(*p*) *Bond* v. *Kent*, 2 Vern. 281.

(*q*) *Capper* v. *Spottiswoode*, Taml. 21.

(*r*) *Nairn* v. *Prowse*, 6 Ves. 752; see *Mackreth* v. *Symmons*, 15 Ves. 329, 348.

(*s*) *Re Brentwood, &c. Co.*, 4 Ch. D. 562.

(*t*) *Nives* v. *Nives*, 15 Ch. D. 649.

(*u*) *Tardiffe* v. *Scrughan*, cited 1 Bro. C. C. 423; *Buckland* v. *Pocknell*, 13 Sim. 406, 412; *Matthew* v. *Bowler*, 6 Hare, 110; *Dixon* v. *Gayfere*, 1 De G. & J. 655, 662.

(*x*) *Mackreth* v. *Symmonds*, 15 Ves. 329, 350-354; *Buckland* v. *Pocknell*, *Dixon* v. *Gayfere*, ubi sup.; *Jersey* v. *Briton, &c. Co.*, L. R. 7 Eq. 400.

(*y*) Stat. 8 & 9 Vict. c. 18.

as in the case of an ordinary sale, and not only for the price of the land, but for all compensation money payable to him (*z*).

Clauses Act 1845.

A vendor's lien on the land sold for unpaid purchase money is not required to be registered by the Middlesex Registry Acts; nor was such registration necessary under the old Yorkshire Registry Acts (*a*). But by the Yorkshire Registries Act, 1884 (*b*), no lien on any lands in Yorkshire in respect of any unpaid purchase money shall have any effect or priority against any assurance for valuable consideration which may be registered under this Act, unless and until a memorandum of such lien or charge has been registered in accordance with the Act. Where a sale of land situate in a compulsory registration district is to be completed (*c*) without payment of the whole price, the vendor must take care to have his vendor's lien entered on the register as an incumbrance prior to registration (*d*); for if this be not done, it appears that the lien will be extinguished on the purchaser's registration as proprietor with an absolute title. The lien will, however, remain unaffected by registration of the title, if the purchaser be registered as proprietor with a possessory title only, or with a qualified title excepting the vendor's lien, or (in the case of a sale of leaseholds) with a good leasehold title (*e*). But as all such titles may be subsequently turned into an absolute title (*f*), the only safe course is to register the vendor's lien in all cases.

Vendor's lien on lands in Middlesex or Yorkshire.

On land situate in a compulsory registration district.

The vendor's lien, like other equitable interests (*g*), is enforceable, as a rule, against all persons who claim under the purchaser's estate in the land sold, either for a legal estate or interest by operation of law, by gratuitous assignment, or as

Against whom the vendor's lien is enforceable.

(*z*) *Walker* v. *Ware, &c. Ry. Co.*, L. R. 1 Eq. 195; *Wing* v. *Tottenham, &c. Ry. Co.*, L. R. 3 Ch. 740; *Allgood* v. *Merrybent, &c. Ry. Co.*, 33 Ch. D. 571; see above, p. 986. But the lien does not extend to the costs of an arbitration, by which the purchase money has been ascertained; *Ferrers* v. *Stafford, &c. Ry. Co.*, L. R. 13 Eq. 524.

(*a*) *Kettlewell* v. *Watson*, 26 Ch. D. 501, 507.

(*b*) Stat. 47 & 48 Vict. c. 54, s. 7; *Battison* v. *Hobson*, 1896, 2 Ch. 403, 412; above, pp. 361 *sq.*

(*c*) Above, pp. 367 *sq.*

(*d*) See Land Transfer Rules, 1903, Nos. 7, 8, 175-181; L. T. R. 1908, No. 43.

(*e*) Stat. 38 & 39 Vict. c. 87, ss. 7-9, 13, 29-35, 38; Land Transfer Rules, 1903, rr. 52-57, 140-143; Wms. Real Prop. 706 *sq.*, 23rd ed.

(*f*) See Land Transfer Rules, 1908, No. 27.

(*g*) Above, pp. 535 *sq.*

purchasers for value with notice of the lien, or for an equitable estate or interest (*h*); but not against any person who has acquired a legal estate or interest in the land sold in good faith as purchaser for value without notice of the lien (*i*). But if the vendor execute a conveyance containing a statement of payment and receipt of the whole purchase money, and allow the purchaser to have the custody of this deed and the other title deeds without obtaining payment of the price, he has put it in the purchaser's power to deal with the land as his own; and it has been held on this ground that a vendor, who so acted, had an inferior claim on the land to an equitable mortgagee from the purchaser by deposit of the title deeds; for the mortgagee was entitled to rely on the statement of payment of the whole price, and the vendor was estopped, as against him, from asserting the untruth of the representation so made (*k*). So, where a vendor joined with the purchaser in executing a mortgage of the land sold (*l*), and where he executed a conveyance for the express purpose of enabling the purchaser to raise money by mortgage (*m*), it was held that he could not assert any lien for unpaid purchase money against the mortgagee. And where, under the old Yorkshire Registry Acts (*n*), vendors of land in Yorkshire had executed a conveyance and allowed it to be registered with the object of enabling the purchaser to re-sell the land in lots, and the conduct of their solicitor, to whom they left everything, was such as to induce sub-purchasers to believe that the purchaser had full power to deal with the land, it was held that they could not assert their lien for unpaid purchase money as against sub-purchasers taking an equitable estate in the land without notice of the vendors' intention to insist on their lien (*o*).

Where the vendor has put it in the purchaser's power to dispose absolutely of the land.

Vendor executing conveyance

If the vendor execute a conveyance to the purchaser without receiving payment of the whole price, he has no lien at common

(*h*) *Mackreth* v. *Symmons*, 15 Ves. 329, 337, 349; *Cave* v. *Cave*, 15 Ch. D. 639, 646-649; *Kettlewell* v. *Watson*, 26 Ch. D. 501, 508; *Wilson* v. *Kelland*, 1910, 2 Ch. 306.

(*i*) *Smith* v. *Evans*, 28 Beav. 59.

(*k*) *Rice* v. *Rice*, 2 Drew. 73, 85; *Rimmer* v. *Webster*, 1902, 2 Ch. 163, 173, 174; above, pp. 652, n. (*z*), 697, 910.

(*l*) *Cood* v. *Pollard*, 9 Price, 544, 10 Price, 109.

(*m*) *Smith* v. *Evans*, 28 Beav. 59.

(*n*) Above, pp. 361, n. (*i*), 993.

(*o*) *Kettlewell* v. *Watson*, 26 Ch. D. 501.

law authorising him to retain possession of the title deeds (*p*). It appears, however, that his equitable lien on the land sold gives him the right to keep the title deeds until payment (*q*). As we have seen (*r*), the vendor is entitled to retain possession and defer conveyance of the land sold until payment of the whole price; and if he propose to make conveyance on payment of part only, he should, before parting with his estate in the land sold, make such stipulation as he desires concerning the custody of the title deeds, including the conveyance itself, pending full payment. And he should not forget that, if before the price is paid he allow the purchaser to have possession of the title deeds, including a conveyance from himself containing a receipt for the purchase money in full, he puts it in the purchaser's power to create, not only legal estates or interests, but also equitable charges, which will exclude or have priority over his vendor's lien (*s*). On the other hand, if the unpaid vendor retain all the title deeds in his own possession, a subsequent purchaser or mortgagee from the purchaser will be affected with notice of the lien, if he omit to make inquiry for the deeds, and so will be postponed to the vendor's claim, notwithstanding that he have acquired the legal estate (*t*).

without payment has no common law lien on the title deeds.

The vendor's lien for unpaid purchase money, after execution of a conveyance to the purchaser, does not entitle him to resume possession of the land sold (*u*), nor does it authorise

How the lien is enforceable.

(*p*) *Goode* v. *Burton*, 1 Ex. 189; see above, p. 639.

(*q*) *Dryden* v. *Frost*, 3 My. & Cr. 670, 672, 673. This authority seems to have escaped the notice of the editors of Dart, V. & P. 6th ed. (see p. 826; 731, 7th ed.), or they would hardly have altered the statement in 2 Dart, V. & P. 731, 5th ed. It appears, indeed, to have been overlooked by Dart himself, and Sugden too; see Sug. V. & P. 434, 565.

(*r*) Above, pp. 545, 546.

(*s*) Above, p. 994.

(*t*) *Worthington* v. *Morgan*, 16 Sim. 547; *Oliver* v. *Hinton*, 1899, 2 Ch. 264. But if he make inquiry for the deeds and receive a reasonable excuse for their non-production, he will not be affected with notice of the lien; *Hewitt* v. *Loosemore*, 9 Hare, 449; and see *Hunt* v. *Elmes*, 2 De G., F. & J. 578; *Ratcliffe* v. *Barnard*, L. R. 6 Ch. 652; *Manners* v. *Mew*, 29 Ch. D. 725, 733; *Hudston* v. *Viney*, 1921, 1 Ch. 98.

(*u*) *Munns* v. *Isle of Wight Ry. Co.*, L. R. 5 Ch. 414, 416, 419; *Williams* v. *Aylesbury, &c. Ry. Co.*, 28 L. T. N. S. 547, 21 W. R. 819; *Allgood* v. *Merrybent, &c. Ry. Co.*, 33 Ch. D. 571, 574. As in the case of a sale of goods, the vendor, after conveyance of the property, is not entitled to rescind the contract for the purchaser's failure to pay the price; Benjamin on Sale, 622, 2nd ed.

him to sell the land so charged (*x*). His only remedy to enforce the lien appears to be to apply to the Court, under its equitable jurisdiction, for a declaration of charge and an order for sale to raise the amount due (*y*). If, however, the order for sale prove ineffectual, the property being unsaleable at any adequate price, the Court may then make an order directing the vendor to be again let into possession thereof (*z*).

Subrogation to vendor's lien of person advancing the purchase money.

If one advance money in payment for land, which another is under contract to buy, he is entitled by subrogation to the same lien which the vendor would have had if the price had remained unpaid (*a*). Thus, where an undischarged bankrupt bought land, and his solicitor paid part of the purchase money for him, it was held that the solicitor should have a lien for the amount so paid, in priority to the claims of the [illegible]ce and creditors in the bankruptcy (*b*).

Where the discharge of incumbrances discovered after conveyance may be set off against unpaid purchase money.

Where a conveyance has been executed without payment of the whole price, the purchaser is entitled in equity to set off against the unpaid purchase money any sums of money expended by him in the discharge of incumbrances subsequently discovered, which were created by the vendor himself or comprehended in the vendor's covenants for title (*c*). And the purchaser is of course entitled to assert the same right as against any assignee of the unpaid purchase money (*d*), unless, in view of the assignment of the debt, the assignee had made inquiry of him as to the state of account between him and the vendor, and had received in answer an admission that the whole amount was owing (*e*). But if any incumbrance discovered subsequently

(*x*) Above, p. 49; and see *A.-G.* v. *Sittingbourne, &c. Ry. Co.*, L. R. 1 Eq. 636.

(*y*) Above, pp. 49, and n. (*h*), 448, n. (*o*); *Mackreth* v. *Symmons*, 15 Ves. 329; *Ecclesiastical Commrs.* v. *Pinney*, 1899, 2 Ch. 729, 1900, 2 Ch. 736, Seton on Judgments, 2220, 2221, 7th ed.

(*z*) *Allgood* v. *Merrybent, &c. Ry. Co.*, 33 Ch. D. 571.

(*a*) *Meux* v. *Smith*, 11 Sim. 410, 427; *Brocklesby* v. *Temperance, &c. Socy.*, 1895, A. C. 173, 182, 185; *Thurstan* v. *Nottingham, &c. Bdg. Socy.*, 1902, 1 Ch. 1, 1903, A. C. 6; and see *Re Connolly Bros.*, 1912 *Ld.* (*No.* 2), 2 Ch. 25; above, p. 860.

(*b*) *Bird* v. *Philpott*, 1900, 1 Ch. 822.

(*c*) *Maynard's case*, 2 Freem. 1; *Tourville* v. *Naish*, 3 P. W. 306, Sug. V. & P. 552; 2 Dart, V. & P. 804, 805, 5th ed.; 905, 906, 6th ed.; 814, 815, 7th ed.

(*d*) Above, p. 749.

(*e*) Above, p. 479; 2 Dart, V. & P. 805, 5th ed.; 906, 6th ed.; 814, 815, 7th ed.

to the conveyance were created under title paramount to the vendor's, and were not within the guarantee provided by his covenants for title (*f*), it appears that the purchaser has no right to withhold payment of any part of the purchase money on that account (*g*), unless the sale were induced by the vendor's *fraudulent* misrepresentation as to his title or otherwise (*h*).

Remedies remaining open after conveyance.

Here it may be convenient to state shortly what remedies remain open to the parties to a sale of land after completion of the contract by conveyance. These are (1) an action to enforce any obligation which arises out of or is collateral to the contract and is not extinguished by the conveyance of the land (*i*), as to recover any unpaid purchase money or to enforce the vendor's lien in respect thereof (*k*), for breach of a collateral stipulation contained in the contract (*l*), or for breach of a collateral warranty (*m*); (2) an action to rescind the contract for fraudulent misrepresentation (*n*), duress or undue influence (*o*), or on the ground of relative equitable disability (*p*): but not for innocent misrepresentation (*q*); (3) an action of deceit for fraudulent misrepresentation (*r*), or an action to recover damages for duress amounting to a tort (*s*); (4) an action for rectification of the conveyance (*t*); (5) an action to enforce any covenant contained in the deed of conveyance, as upon covenants for title (*u*) or to enforce restrictive covenants (*x*), or a covenant to build, repair, or the like (*y*); (6) an action to enforce any covenant or agreement running with the land sold

(*f*) Above, p. 608.
(*g*) Consider *Maynard's case*, 2 Freem. 1; *Anon.* ib. 106; *Thomas* v. *Powell*, 2 Cox, 394; *Wakeman* v. *Rutland*, 3 Ves. 233, 235; *contra*, *Anon.*, 2 Ch. Ca. 19; but this is not law; Sug. V. & P. 551, 552.
(*h*) Above, pp. 614, 790, 794.
(*i*) Above, pp. 988, 989.
(*k*) Above, pp. 990, 995.
(*l*) Above, pp. 60, 61, 575, 989.
(*m*) Above, pp. 575, 794, 798, 802, n. (*t*), 989, 990.
(*n*) Above, pp. 790, 794, 815.
(*o*) Above, p. 829.
(*p*) Above, pp. 947 *sq.*
(*q*) Above, pp. 575, 614, 682, 795, 797, 798; *Seddon* v. *North Eastern Salt Co., Ld.*, 1905, 1 Ch. 326.
(*r*) Above, pp. 790, 794, 795, 798, 804.
(*s*) Above, p. 831.
(*t*) Above, pp. 601, 603, 605, 611, 625, 774, 787, 788.
(*u*) Above, pp. 575, 605, 608.
(*x*) Above, pp. 467 *sq.*, 624.
(*y*) See above, p. 468.

at law or in equity, as covenants for title entered into by the vendor's predecessor in estate (*z*), or restrictive covenants made with the vendor or any of his predecessors in title (*a*); (7) an action founded on the legal incapacity of a party to the sale, as by an infant vendor (*b*) or a corporation disabled from selling its land (*c*), to recover the land sold; and (8) an action to rescind the contract, if made under a common mistake of fact (*d*).

§ 2.—*Of Breach of the Contract and Discharge therefrom after Breach.*

Breach of the contract.

A breach of the contract is committed when one of the parties fails to perform some obligation imposed on him by the agreement at the time when it ought to be performed (*e*). The obligations undertaken on a sale of land have been already enumerated (*f*); they consist mainly in the vendor's duty to show a good title and convey the land sold and the purchaser's to pay the price. With respect to the time for performance of these obligations, we have seen that the general rule is that any act necessary to be done by either party in order to carry out the contract must be done within a reasonable time (*g*); and that, although a day be fixed for completion of the contract, time is not in general of the essence of the contract either in equity or, since the Judicature Acts, at law (*h*). It follows that, except where time is of the essence of the stipulation (*i*), a breach of contract is only committed in the case of unreasonable delay in the performance of any act agreed to be done (*j*). For example, where time is not essential, a party failing to complete a sale of land on the day fixed therefor by the agree-

Time when the contract is broken.

At what time failure to complete a

(*z*) Sug. V. & P. 551; above, pp. 617-620.
(*a*) Above, pp. 467 *sq.*, 472-474.
(*b*) Above, p. 858.
(*c*) Above, pp. 917 *sq.*
(*d*) Above, p. 766.
(*e*) Consider *Noble* v. *Edwardes*, 5 Ch. D. 378; *Patrick* v. *Milner*, 2 C. P. D. 342; *Howe* v. *Smith*, 27 Ch. D. 89, 103, 104; *Powell* v. *Marshall*, 1899, 1 Q. B. 710; *Stickney* v. *Keeble*, 1915, A. C. 386; and see above, pp. 154-157, n. (*d*).
(*f*) Above, pp. 31-34.
(*g*) Above, pp. 45, 46.
(*h*) Above, pp. 52-54, 543-545.
(*i*) Above, pp. 54, 56, 543-545.
(*j*) Consider *Mackreth* v. *Marlar*, 1 Cox, 259; *Lloyd* v. *Collett*, 4 Bro. C. C. 469, 4 Ves. 690, n.; *Venn* v. *Cattell*, 27 L. T. 469; *Howe* v. *Smith*, 27 Ch. D. 89; *Cornwall* v. *Henson*, 1900, 2 Ch. 298; *Stickney* v. *Keeble*, 1915, A. C. 386.

ment does not then commit a breach of contract either in equity or at law (*k*); it is only on failure to complete within a reasonable time after that day that the contract is broken (*l*). The result is that, where either party makes delay in performing his part of the agreement, the most prudent course for the other is to serve a notice upon him making time of the essence of the contract, but taking care to allow him a reasonable time (having regard to the circumstances of the case) from the date of service of the notice, within which to accomplish the acts he has delayed to perform (*m*). If after service of such a notice the party in default fail to do the required act within the time so limited, the other party will be then entitled to treat the contract as broken (*n*). But where one party makes delay in completion for an *unreasonably* long time, no notice making time of the essence of the contract is necessary (*o*).

sale of land is a breach of contract.

Service of notice making time essential.

The effect of a breach of contract is in every case to give rise to a right of action for debt or damages against the party who commits it, at suit of the other party to the agreement: but the breach may or may not operate to discharge the other from his obligation under the contract, and to give him the option of rescinding or enforcing the contract. This arises from the fact that, according to English law, the duty created by a contract is not an entire and indivisible thing, but may consist of various separate obligations undertaken by one party; and the performance of any of these obligations may or may not be a condition precedent to his enforcing the other party's liability (*p*). If the obligation broken be such that its performance by the defaulting party was not essential to his enforcing the contract himself, the other party is not released from his own duty under the contract, and has merely a right of action for the breach. Thus, where a sale of land was made for a price payable by several small instalments, and the purchaser made default in paying the last instalment, it was considered that the vendor was entitled only to sue for the amount due and not to

Effect of breach of contract.

Cornwall v. *Henson.*

(*k*) *Patrick* v. *Milner*, 2 C. P. D. 342.
(*l*) *Howe* v. *Smith*, 27 Ch. D. 89, 103, 104.
(*m*) Above, pp. 45, 46, 545.
(*n*) Above, pp. 45, 46, and cases there cited.
(*o*) *Farrant* v. *Olver*, 1922, W. N. 47, 127 L. T. 145.
(*p*) Above, pp. 792-794.

rescind the contract of sale (*q*). And, as we have seen (*r*), the breach of a *pure* warranty, not amounting to a condition, does not give rise to a right to avoid a sale. Breach of an obligation of this kind is no bar to the enforcement of the rest of the contract by the party in default, so long as he offer to perform the stipulation broken when insisting on the other's liability (*s*). But if the performance of the obligation broken be a condition precedent to the liability of the party who is not in default, the breach discharges him from his own obligation of the contract, and gives him the right, at his election, to rescind the contract or to sue upon it for the breach.

Discharge of a contract by breach.

This proposition is occasionally summarized as the discharge of the contract by breach; a term which is not perfectly accurate and may mislead a student of law. The contract is not extinguished by the breach; for no one may discharge himself from his contract by breaking it; and the other party may enforce the contract after the breach. The true sense of the expression is that one party to a contract may be discharged from his obligation thereunder by the *other* party's breach of the contract. This doctrine has been already mentioned (*t*); and it comes into operation where the parties' intention, to be gathered from the terms of the whole contract, is that the *performance* by one of them of his part of the contract, or of some particular stipulation contained therein, shall be a *condition precedent* to the other party's liability under the agreement (*u*). In that case, the breach by the one of his duty under the contract or stipulation discharges the other from the obligation of performing his part of the contract; and the other will be immediately entitled at his election either to rescind the contract and sue for

(*q*) *Cornwall* v. *Henson*, 1900, 2 Ch. 298; and see *Workman, Clark & Co., Ld.* v. *Lloyd Brazileno*, 1908, 1 K. B. 968. A condition for forfeiture of instalments already paid on default in payment of a further instalment is in the nature of a penalty against which the Court will relieve on payment of that instalment; *Kilmer* v. *British Columbia, &c., Ld.*, 1913, A. C. 319; even though, since time is made of the essence of the contract, specific performance cannot be ordered; *Steedman* v. *Drinkle*, 1916, 1 A. C. 275.

(*r*) Above, pp. 791, 792.

(*s*) *Cornwall* v. *Henson*, ubi sup.; and consider the equitable doctrine that a contract might be specifically enforced, notwithstanding that a stipulation as to time were broken; above, pp. 52-54, 543-545.

(*t*) Above, p. 792.

(*u*) *Hotham* v. *East India Co.*, 1 T. R. 638, 645; *Bettini* v. *Gye*, 1 Q. B. D. 183, 186, 187; above, pp. 792, and n. (*u*), 999.

the return of any money paid or property transferred by him thereunder, or else to affirm the contract and sue for damages for the breach (*x*). If, however, he choose to affirm the contract and the performance of his own duty thereunder were a condition precedent to the defaulting party's liability, then he must show that he has (so far as possible) performed, or otherwise has offered to perform his own part of his agreement in order to recover damages for the other's breach (*y*). Thus, on a sale of land, the performance by the vendor of his obligation to show a good title is a condition precedent to the purchaser's liability under the contract (*z*); and if this duty be not discharged, the purchaser may at once, without waiting for the day fixed for completion, insist upon the breach and either rescind the contract or treat it as broken accordingly (*a*). So, also, the fulfilment of a warranty of quality or any similar warranty or representation by the vendor which has induced the sale is, in general, a condition precedent to the purchaser's liability to carry out the contract; and a breach thereof entitles him to rescind (*b*), or if the stipulation broken be a part of the contract (*c*), to claim damages for the vendor's non-performance of the agreement. And as we have seen (*d*), when the title has been accepted, the stipulations requiring the vendor to convey the land sold and the purchaser to pay the price are, as a rule, dependent on each other; the performance of each is a condition precedent to liability under the other; and if the vendor refuse

Breach of warranty of quality or similar representation.

Breach of the duty to convey or pay the price.

(*x*) *Moses* v. *Macferlan*, 2 Burr. 1005, 1010 *sq.*; *Seaward* v. *Willock*, 5 East, 198, 202; *Flight* v. *Booth*, 1 Bing. N. C. 370, 375, 376; *Michael* v. *Hart*, 1902, 1 K. B. 482, 490; *General Billposting Co., Ld.* v. *Atkinson*, 1908, 1 Ch. 537, affd., 1909, A. C. 118; above, p. 792.

(*y*) *Glazebrook* v. *Woodrow*, 8 T. R. 366; *Poole* v. *Hill*, 6 M. & W. 835; *Laird* v. *Pim*, 7 M. & W. 474; above, p. 792.

(*z*) Above, p. 31, n. (*b*).

(*a*) *Hoggart* v. *Scott*, 1 Russ. & My. 293, 295; *Forrer* v. *Nash*, 35 Beav. 167, 171; *Weston* v. *Savage*, 10 Ch. D. 736; *Brewer* v. *Broadwood*, 22 Ch. D. 105, 109; *Lee* v. *Soames*, 36 W. R. 884; above, pp. 152-157, 173, 174, 178; and see above, pp. 676-681, 753, 754, as to a breach of contract occurring by reason of a deficiency in quantity of the land or estate promised to be conveyed. It is respectfully submitted that the theory put forward by Parker, J., in *Halkett* v. *Dudley*, 1907, 1 Ch. 590, 596, that this right of the purchaser is no more than an equitable right affecting the equitable remedy by way of specific performance, is erroneous; see above, p. 155, and n. (*d*).

(*b*) Above, pp. 755, 756, 759, 790-794, 796, 797, 801, 803; and see *Ellinger* v. *Mutual, &c. Co.*, 1905, 1 K. B. 31.

(*c*) Above, pp. 790-794, 796.

(*d*) Above, pp. 545, 546, 793.

to convey (*e*), or the purchaser fail to pay (*f*), the other party is discharged from his own obligation under the contract, and may either rescind the agreement for sale or sue for damages thereunder. But if the purchaser fail to pay the price, the vendor affirming the contract cannot recover damages thereunder without proving that he has shown a good title and has offered to convey the land (*g*). So, if the vendor should refuse to convey, the purchaser claiming damages for breach of the contract must show that he has tendered a conveyance and offered to pay the purchase money (*h*).

Breach of contract by renunciation of performance.

A breach of contract may be committed, not only by the failure to perform some obligation under the contract at the time when it ought to be fulfilled, but also by the renunciation of performance of the contract; and this may occur in two ways. If either party absolutely refuse, or if by his own act he make it impossible for him to carry out his part of the agreement, the other is entitled at his election either to treat such renunciation of performance as a breach of contract, and at once to rescind or sue upon the contract accordingly, or else to treat the agreement as still subsisting, wait till the time is gone by for the renouncing party to perform the acts promised, and then sue him for the breach occasioned by such non-performance (*i*). If the injured party adopt the former alternative, he will be entirely discharged from his own obligation under the contract; so much so, that if he choose to treat the renunciation as a breach and to sue at once for damages in *affirmance* of the contract, he

(*e*) *Engel* v. *Fitch*, L. R. 3 Q. B. 314, 4 Q. B. 659; *Bain* v. *Fothergill*, L. R. 7 H. L. 205, 209; *Day* v. *Singleton*, 1899, 2 Ch. 320, 329, 333, 334; and see *Jones* v. *Gardiner*, 1902, 1 Ch. 191, 195; *Stickney* v. *Keeble*, 1915, A. C. 386.

(*f*) *Poole* v. *Hill*, 6 M. & W. 835; *Laird* v. *Pim*, 7 M. & W. 474; *Howe* v. *Smith*, 27 Ch. D. 89; *Soper* v. *Arnold*, 37 Ch. D. 96, 14 App. Cas. 429; *Hall* v. *Burnell*, 1911, 2 Ch. 551, 555; *Farrant* v. *Olver*, 1922, W. N. 47, 127 L. T. 145.

(*g*) *Noble* v. *Edwardes*, 5 Ch. D. 378, 393; above, pp. 793, n. (*x*), 1001; see also *Powell* v. *Marshall*, 1899, 1 Q. B. 710; above, pp. 520, 521.

(*h*) See previous note, and *Bennett* v. *Stone*, 1902, 1 Ch. 226, 236, 1903, 1 Ch. 509, 517, 523, 527.

(*i*) *Hochster* v. *Delatour*, 2 E. & B. 678; *De Bernardy* v. *Harding*, 8 Ex. 822, 824; *Frost* v. *Knight*, L. R. 7 Ex. 111; *Johnstone* v. *Milling*, 16 Q. B. D. 460; *Michael* v. *Hart*, 1902, 1 K. B. 482; see also *Ogdens, Ld.* v. *Nelson*, 1903, 2 K. B. 287, 1904, 2 K. B. 410, 1905, A. C. 109; *General Billposting Co., Ld.* v. *Atkinson*, 1908, 1 Ch. 537, affd. 1909, A. C. 118.

will not be bound to prove the performance of, or any offer to perform, his own part of the agreement, but may recover if the other party's conduct alone prevented him from performing it (*k*). If, on the other hand, he elect not to treat the renunciation as an immediate breach, but to keep the contract open till the time arrives for its performance, the agreement remains subsisting in the interval for the benefit and at the risk of both parties equally; and if the injured party wait to sue upon the breach occasioned by the ultimate non-performance of the agreement, he must perform or offer to perform all stipulations in the contract, whereof performance is a condition precedent to the other's liability (*l*). Besides which, if he keep the contract alive, the other party will be in the same position as if he had never renounced performance, and may avail himself of any defence to an action for the breach occasioned by his ultimate non-performance of his contractual obligations in the same manner as if he had all along been ready and willing to perform them (*m*). Thus, if the contract were to be performed only in case of the fulfilment of some condition, so that it might be discharged for impossibility of performance (*n*), and after a renunciation, not chosen to be accepted as a breach of contract, but before the time for carrying out the renouncing party's obligations, the condition were by some extraneous cause rendered impossible of fulfilment, the renouncing party would be excused, equally with the other, from any further performance of the contract. So, if by some event occurring during the same interval the completion of the contract were rendered illegal (*o*), the renouncing party would be entitled to take advantage of that defence (*p*). Renunciation of performance of a contract may be made by words or conduct, but in either case the words or acts relied on must amount to an absolute and unqualified repudiation of all intention to complete the contract; otherwise there is no such renunciation as may be treated as a breach (*q*). And if a party renounce performance of some

(*k*) *Cort* v. *Ambergate, &c. Ry. Co.*, 17 Q. B. 127; *Braithwaite* v. *Foreign Hardwood Co.*, 1905, 2 K. B. 543.

(*l*) Above, p. 1000.

(*m*) *Frost* v. *Knight*, L. R. 7 Ex. 111, 112; *Michael* v. *Hart*, 1902, 1 K. B. 482, 490.

(*n*) Above, pp. 983 *sq.*

(*o*) Above, pp. 843, 844.

(*p*) *Avery* v. *Bowden*, 5 E. & B. 714.

(*q*) *Avery* v. *Bowden*, 5 E. & B. 714; *Johnstone* v. *Milling*, 16 Q. B. D. 460; *Cornwall* v. *Henson*, 1900, 2 Ch. 298.

particular stipulation only, and not of his whole duty under the contract, that does not entitle the other to rescind or sue upon the contract as for an immediate breach thereof, unless the particular stipulation were such as goes to the root of the whole consideration, its *performance* being a condition precedent to the renouncing party's right to enforce the agreement (*r*). If one party elect to treat the other's renunciation as a breach of contract, he cannot afterwards recede from this position and claim to treat the contract as subsisting (*s*). And if he definitely claim to treat some words or conduct, which he wrongly supposes to be a renunciation, as a breach of the contract discharging him from his own obligations thereunder, such claim amounts to a renunciation of the contract on his part, and may be so treated by the other party (*t*).

Renunciation of a contract to sell land.

These doctrines are illustrated on a sale of land, where, before the day fixed for completion, either party expressly refuses to perform or manifests an absolute and unqualified intention of not performing the contract or some essential part thereof, such as the duty to prove title (*u*), to convey or pay the price, or where the vendor sells and conveys the land to a stranger to the contract (*x*), or lets it to a stranger with an option of purchase (*y*).

Discharge of the obligation arising on breach of contract.

Release of right of action.

Accord and satisfaction.

The obligation arising from breach of the contract—that is, the liability to an action at law at suit of the injured party (*z*) —may be discharged in the following ways:—First, by a release, which, if gratuitous, must be made by deed (*a*). Secondly, by accord and satisfaction, which is the injured party's acceptance of something else in discharge of the liability (*b*). This may, in general, be anything in the way of valuable considera-

(*r*) *Johnstone* v. *Milling,* 16 Q. B. D. 460; *Cornwall* v. *Henson,* 1900, 2 Ch. 298; above, pp. 792, 1000, 1001.
(*s*) *Johnstone* v. *Milling,* ubi sup.; *Smith* v. *Butler,* 1900, 1 Q. B. 694; above, pp. 810, 1002.
(*t*) *Smith* v. *Butler,* ubi sup.
(*u*) *Lloyd* v. *Collett,* 4 Bro. C. C. 469, 4 Ves. 690, n.
(*x*) Above, p. 534, n. (*u*).
(*y*) *Cornwall* v. *Henson,* 1900, 2 Ch. 298.
(*z*) Above, p. 999.
(*a*) *Edwards* v. *Walters,* 1896, 2 Ch. 157; Wms. Pers. Prop. 258, 17th ed.
(*b*) Bac. Abr. Accord and Satisfaction; 3 Black. Comm. 15, 16, 306.

tion that he chooses to take (*c*); for, as in other cases, the law leaves the parties to make what bargain they please, and does not inquire into the adequacy of the consideration (*d*). But if the right of action to be discharged be for a certain sum of money (that is, a debt), and not for unliquidated damages (*e*), the well-known rule applies that the acceptance of a smaller sum *of money* than that due is not satisfaction of the whole amount owing (*f*), unless there be some consideration for the discharge of the residue, such as payment at an earlier date than the whole sum is due (*g*), or the concurrence of other creditors in accepting a composition (*h*). According to the general rule, however, the acceptance of a negotiable security (even a cheque) for a smaller amount may be a sufficient satisfaction to extinguish the whole debt, the creditor having chosen to take a valuable thing, which is not *money*, instead of payment (*i*). Where the right of action is for unliquidated damages, the acceptance of any certain sum of money is a sufficient satisfaction (*k*). Under the present law, accord and satisfaction may in all cases be well made without deed, even where the right of action discharged was for a certain sum of money payable under a deed (*l*). Thirdly, by the award of an

Award on arbitration.

(*c*) Litt. s. 344; Co. Litt. 212 b; *Pinnel's case*, 5 Rep. 117.

(*d*) Above, pp. 827, 828; *Bainbridge* v. *Firmstone*, 8 A. & E. 743; Byles, J., *Westlake* v. *Adams*, 5 C. B. N. S. 248, 265.

(*e*) *Wilkinson* v. *Byers*, 1 A. & E. 106.

(*f*) *Pinnel's case*, 5 Rep. 117; *Fitch* v. *Sutton*, 5 East, 230; *Foakes* v. *Beer*, 9 App. Cas. 605; *Underwood* v. *Underwood*, 1894, P. 204.

(*g*) Co. Litt. 212 b.

(*h*) *Carey* v. *Barrett*, 4 C. P. D. 379.

(*i*) *Sibree* v. *Tripp*, 15 M. & W. 23; *Goddard* v. *O'Brien*, 9 Q. B. D. 37; *Bidder* v. *Bridges*, 37 Ch. D. 406. As to the effect of the acceptance of a bill or note in discharge of a debt, see *Re a Debtor*, 1908, 1 K. B. 344, and cases there cited. Here it may be noted that, except in the case of an account current of debts and credits, or by the effect of the bankruptcy rules as to mutual credits, mutual debts, or mutual dealings, a debt is not discharged by the fact that the creditor owes the debtor an equal sum, notwithstanding that this may be pleaded as a set-off in an action to recover the debt; Wms. Pers. Prop. 257, 17th ed.; *Re Hiram Maxim Lamp Co.*, 1903, 1 Ch. 70; *Smith* v. *Betty*, 1903, 2 K. B. 317; *Re Leeds, &c. Co.*, 1904, 2 Ch. 45.

(*k*) *Blake's case*, 6 Rep. 43 b; *Peytoe's case*, 9 Rep. 77 b, 79 b; *Wilkinson* v. *Byers*, 1 A. & E. 106.

(*l*) The rule of common law was that an obligation contracted by deed to pay a certain sum of money could not be effectually discharged without deed; but in equity such an obligation might be discharged by accord and satisfaction made without deed; and since the Judicature Acts the rule of equity prevails in this respect; *Steeds* v. *Steeds*,

arbitrator or arbitrators, to whom the matter in dispute has been referred for determination (*m*). But a *debt* cannot be discharged in this way, unless it were referred to arbitration, together with some other matter in controversy and of an uncertain nature (*n*). Fourthly, under the bankruptcy of the party in default, by his obtaining an order for his discharge or by the creditors' acceptance and the approval by the Court of a composition or scheme of arrangement (*o*). And, fifthly, by the injured party pursuing the right of action to judgment, after which the original obligation is, as a rule, merged in the judgment (*p*), and the plaintiff is estopped from suing again upon the same cause of action (*q*).

Bankruptcy.

Judgment.

22 Q. B. D. 537; above, p. 977. For the old law, see *Nichols' case*, 5 Rep. 43; *Blake's case*, 6 Rep. 43 b; *Peytoe's case*, 9 Rep. 77, 79; *Preston* v. *Christmas*, 2 Wils. K. B. 86; Doctor & Student, Dial. 1, c. 12; stat. 4 & 5 Anne, c. 16, s. 12.

(*m*) Bac. Abr. Arbitrament and Award; 3 Black. Comm. 16, 306; Chitty on Pleading, i. 488, iii. 105, 7th ed. Written agreements to submit present or future differences to arbitration are now governed by the Arbitration Act, 1889 (stat. 52 & 53 Vict. c. 49). Such an agreement is therein referred to as a submission; sect. 27. By sect. 1, a submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of Court. By sect. 4, any legal proceedings commenced in any Court by any party to a submission may be stayed at the instance of any other party to the submission on application made at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, provided the Court or a judge thereof be satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant has from the commencement of the proceedings been ready and willing to do all things necessary to conduct the arbitration. See *Baker* v. *Yorkshire, &c. Co.*, 1892, 1 Q. B. 144; *Ives and Barker* v. *Willans*, 1894, 2 Ch. 478; *Kitts* v. *Moore*, 1895, 1 Q. B. 253; *Ford's Hotel Co.* v. *Bartlett*, 1896, A. C. 1; *Vawdrey* v. *Simpson*, 1896, 1 Ch. 166; *Zalinoff* v. *Hammond*, 1898, 2 Ch. 92; *County Theatres and Hotels, Ld.* v. *Knowles*, 1902, 1 K. B. 480; *Richardson* v. *Le Maitre*, 1903, 2 Ch. 222; *Morriston Tinplate Co.* v. *Brooker*, 1908, 1 K. B. 403; *Austin & Whiteley, Ld.* v. *Bowley & Sons*, 108 L. T. 921; *Parker, Gaines & Co.* v. *Turpin*, 1918, 1 K. B. 358. But where an action has been commenced and not stayed, a subsequent award made without the consent of the plaintiff is invalid, and will not afford a defence to the action; *Doleman & Sons* v. *Ossett Corpn.*, 1912, 3 K. B. 257.

(*n*) Rolle, Abr. 264; Bac. Abr. Arbitrament and Award (A.).

(*o*) Above, pp. 517, 998.

(*p*) *Expte. Fewings*, 25 Ch. D. 338; *Wegg Prosser* v. *Evans*, 1895, 1 Q. B. 108; *Re King and Beesley*, ib. 189; *Economic, &c. Socy.* v. *Usborne*, 1902, A. C. 147; and consider *Kendall* v. *Hamilton*, 4 App. Cas. 504; *Taylor* v. *Holland*, 1902, 1 K. B. 676, 681; *Morel* v. *Westmorland*, 1904, A. C. 11. Cf. *Isaacs* v. *Salbstein*, 1916, 2 K. B. 139 (contract not discharged by judgment for the price of the property sold against a person not a party to the contract).

(*q*) *Slade's case*, 4 Rep. 92, 94b; Chitty on Pleading, i. 488, iii.

Effect of Statutes of Limitation.

The right of action upon a contract may also be barred by lapse of time under the Statutes of Limitation; but this does not altogether extinguish the obligation (*r*). For example, a statute-barred debt, though it cannot be pleaded as a set-off (*s*), may be revived by acknowledgment (*t*), may, as a rule, be lawfully paid by an executor or administrator (*u*), or may, in equity, be required to be brought into account before the party liable is allowed to participate in any fund which should have been increased by its discharge in due course (*x*). Also, if two persons be mutually indebted, having cross claims against each other, some of which could be met by the plea of the Statute of Limitations, and they come to an agreement as to the sum due from one of them upon a balance of account, that agreement is equivalent to actual payment of the debts, which it purports to extinguish; it is valid as having been for a new and valuable consideration, and cannot be impeached on the ground that some of the items allowed in account were statute barred (*y*). A right of action arising from breach of a contract to sell land is barred, as a rule, in six years after the breach, if the contract were not made by deed (*z*); but if the contract were under seal,

107, 7th ed. A judgment by consent has the same operation in this respect as any other judgment; *Re South American, &c. Co.*, 1895, 1 Ch. 37.

(*r*) *Courtenay* v. *Williams*, 3 Hare, 539, 551 *sq.*; *London and Midland Bank* v. *Mitchell*, 1899, 2 Ch. 161, 168; *Re Lloyd*, 1903, 1 Ch. 385, 401; Stirling, L. J., *Re Stucley*, 1906, 1 Ch. 67, 81; *Re Bruce*, 1908, 2 Ch. 682, 684, 686.

(*s*) *Remington* v. *Stevens*, 2 Strange, 1271; stat. 9 Geo. IV. c. 14, s. 4; *Walker* v. *Clements*, 15 Q. B. 1046; *Dingle* v. *Coppen*, 1899, 1 Ch. 720; *Smith* v. *Betty*, 1903, 2 K. B. 317.

(*t*) Bac. Abr. Limitation of Actions (E. 8); *Morgan* v. *Rowlands*, L. R. 7 Q. B. 493; *Chasemore* v. *Turner*, L. R. 10 Q. B. 500; *Green* v. *Humphreys*, 23 Ch. D. 207; *Cooper* v. *Kendall*, 1909, 1 K. B. 405. Any such acknowledgment unless made by way of payment of some principal or interest due on a debt, must be in writing signed by the party chargeable therewith or his agent; stats. 9 Geo. IV. c. 14, s. 1; 19 & 20 Vict. c. 97, s. 13; Wms. Pers. Prop. 168, 172, 554, 16th ed.

(*u*) See Wms. Pers. Prop. 609, 17th ed.; *Re Wenham*, 1892, 3 Ch. 59; *Midgley* v. *Midgley*, 1893, 3 Ch. 282.

(*x*) *Courtenay* v. *Williams*, 3 Hare, 539, 551 *sq.*; *Re Cordwell's Estate*, L. R. 20 Eq. 644; *Re Akerman*, 1891, 3 Ch. 212; *Re Goy & Co., Ld.*, 1900, 2 Ch. 149, 153, 154; *Re Wheeler*, 1904, 2 Ch. 66, 71; *Re Dacre*, 1915, 2 Ch. 480, affd. 1916, 1 Ch. 344; *Re Melton*, 1918, 1 Ch. 37; cf. *Re Bruce*, 1909, 2 Ch. 682; *Re Savage*, 1918, 2 Ch. 146; and as to the effect of insolvency, see *Re Peruvian Ry. Construction Co., Ld.*, 1915, 2 Ch. 144, 442.

(*y*) *Ashby* v. *James*, 11 M. & W. 542; *Turner* v. *Willis*, 1905, 1 K. B. 468.

(*z*) Stat. 21 Jac. I. c. 16, s. 3.

then in twenty years (*a*). If, however, any acknowledgment of liability should have been made in signed writing or by payment (*b*), the time runs from the giving of the acknowledgment or the last acknowledgment. And if the party entitled to sue were under the disability of infancy, lunacy or coverture when the cause of action accrued, the time runs from the date of removal of the disability (*c*). But as we have seen, a married woman entitled to separate property under the Married Women's Property Act, 1882, is held not to be under the disability of coverture so as to prevent time running against her under the Statutes of Limitation as regards her rights of action in respect of such property, or to recover damages which will form such property (*d*). If the party liable were beyond seas at the time when the right of action accrued, the period of limitation does not begin to run till his return (*e*). The time for enforcing the vendor's lien on the land sold (*f*) is now limited to twelve years from the date when a present right to receive the money secured by the lien accrued to some person capable of giving a discharge for the same, or from the date of the last acknowledgment by payment or in signed writing (*g*). The time when the purchase money accrues due for the purposes of this enactment is the date of actual completion, if a conveyance to the purchaser has been executed; but if the purchaser has been let into possession without conveyance, then the time when completion ought to have taken place; that is, when the vendor showed such a title as the purchaser was bound to accept (*h*). And interest on the purchase money does not become due and payable until the principal has become payable; though it may have to be computed from the day fixed for

Vendor's lien.

(*a*) Stat. 3 & 4 Will. IV. c. 42, s. 3.

(*b*) Above, p. 1007, and n. (*t*); stat. 3 & 4 Will. IV. c. 42, s. 5.

(*c*) Stats. 21 Jac. I. c. 16, s. 3; 3 & 4 Will. IV. c. 42, s. 4; 19 & 20 Vict. c. 97, s. 10.

(*d*) Above, p. 898.

(*e*) Stats. 4 Anne, c. 16, s. 19; 3 & 4 Will. IV. c. 42, s. 4; *Musurus Bey* v. *Gadban*, 1894, 2 Q. B. 352. But where one of several persons jointly liable was beyond seas, his absence does not prevent the time of limitation from running as against the others not so absent; and the recovery of judgment against them will not bar an action against him on his return; stat. 19 & 20 Vict. c. 97, s. 11.

(*f*) Above, pp. 990, 996.

(*g*) Stat. 37 & 38 Vict. c. 57, s. 8, replacing 3 & 4 Will. IV. c. 27, s. 40.

(*h*) *Toft* v. *Stephenson*, 7 Hare, 1, 1 De G., M. & G. 28, 5 ib. 735; above, pp. 543, 545, 546.

completion (*i*). It appears that, where the contract of sale was made by deed, the right to sue the purchaser personally for the amount due on the vendor's lien is barred within the same time as the lien itself (*k*): though, if the vendor had waived his lien, it appears that the time of limitation would be twenty years (*l*). Where the agreement for sale was a simple contract, the right to sue the purchaser personally for the price is barred at the end of six years (*m*), though the vendor's lien would not be barred until twelve years had elapsed. It appears that a vendor suing to enforce his lien can only so recover six years' arrears of interest due thereon (*n*); but that, where the payment of the interest is secured by bond or other specialty, he can recover twelve years' arrears by suing the purchaser personally (*o*).

The equitable right to specific performance of the contract.

It has been mentioned that, as a rule, either party to a contract to sell land is entitled to sue in equity for specific performance of the agreement (*p*). This right is, in general, founded on a breach of the contract, but not in the same manner as the right to sue at law. The Court has no jurisdiction to award damages at law except in case of a breach of the contract (*q*); while the equitable jurisdiction to order an agreement to be specifically performed is not limited to the cases in which at law damages would be recoverable (*r*). At the same time the Court, in exercising its discretion (*s*) to grant this equitable relief, will hardly interfere to coerce a party who is

(*i*) *S. C.*, 5 De G., M. & G. 735; above, pp. 54, 491, 668, 672.

(*k*) Consider *Sutton* v. *Sutton*, 22 Ch. D. 511; *Fearnside* v. *Flint*, ib. 579; *Re Frisby*, 43 Ch. D. 106; *Re England*, 1895, 2 Ch. 820; *Shaw* v. *Crompton*, 1910, 2 K. B. 370; and see *Re Jordison*, 1922, 1 Ch. 440, 456, overruling *Re Turner*, 1917, 1 Ch. 422.

(*l*) Above, pp. 991 *sq.*, 1008.

(*m*) *Barnes* v. *Glenton*, 1899, 1 Q. B. 885.

(*n*) Stat. 3 & 4 Will. IV. c. 27, s. 42; *Hunter* v. *Nockolds*, 1 Mac. & G. 640; *Dingle* v. *Coppen*, 1899, 1 Ch. 726, 729, 746; *Re Lloyd*, 1903, 1 Ch. 385, 398-401.

(*o*) Stat. 3 & 4 Will. IV. c. 42, s. 3, as modified by 37 & 38 Vict. c. 57, s. 8; *Sims* v. *Thomas*, 12 A. & E. 536; and cases cited in note (*k*), above.

(*p*) Above, p. 36.

(*q*) See above, p. 998, n. (*c*).

(*r*) *Bettesworth* v. *St. Paul's*, Select Cases, t. King, 66, 1 Bro. P. C. 240; *Cannel* v. *Buckle*, 2 P. W. 243, 244; *Lennon* v. *Napper*, 2 Sch. & Lef. 682, 684; *Bass* v. *Clivley*, Taml. 80, where a decree for specific performance was made against a defendant who had committed no breach of contract, but the plaintiff was ordered to pay the costs; Fry, Sp. Perf. § 60, p. 26, 3rd ed.; above, pp. 12, 40-42, 676, 677.

(*s*) Above, p. 36.

of his own accord duly carrying out the contract (*t*); so that the right to pursue this remedy must in general depend on the defendant's failure or refusal to perform the agreement (*u*). This right is, however, entirely distinct from the right of action arising on breach of the contract at law (*v*). Thus, the equitable right to enforce the contract specifically may be barred by the laches of the person entitled (*x*), while his right to sue for damages is unimpaired (*y*). And we have seen that the vendor's liability to be sued for specific performance of the agreement is not destroyed by the vendor's bankruptcy, or any proceedings therein (*z*).

Limitation of actions against paid vendor remaining in possession.

If the vendor, having received the purchase money and executed a conveyance to the purchaser, should remain in possession of the land sold, without giving any acknowledgment in writing of the purchaser's title, it appears that the purchaser would be barred under the Real Property Limitation Acts, 1833 and 1854 (*a*), from recovering such possession at the end of twelve years from the date of the execution of the conveyance (*b*). If the vendor should remain in possession after having received the purchase money, but without having executed a conveyance, and without such acknowledgment, it appears that the purchaser's equitable right to recover possession of the land would be barred under those Acts in twelve years after the date of payment of the purchase money (*c*). It is thought that the vendor would not in either case be an *express* trustee for the purchaser within the meaning of sect. 25 of the Act of 1833 (*d*).

(*t*) *Whitmel* v. *Farrel*, 1 Ves. sen. 256, 258; *Milnes* v. *Gery*, 14 Ves. 400, 409; *Price* v. *Penzance Corp.*, 4 Hare, 506.
(*u*) See Van Heythuysen's Equity Draftsman, i. 9 *sq.*, 2nd ed.; Fry, Sp. Perf. §§ 3, 4, 47, pp. 3, 20, 3rd ed.
(*v*) Above, p. 999.
(*x*) *Eads* v. *Williams*, 4 De G., M. & G. 674, 691; *Levy* v. *Stogdon*, 1898, 1 Ch. 478, 484, affirmed, 1899, 1 Ch. 5.
(*y*) *Cornwall* v. *Henson*, 1900, 2 Ch. 298.
(*z*) Above, pp. 517, 518, 521, 522, 987, 988.
(*a*) Stats. 3 & 4 Will. IV. c. 27, s. 3; 37 & 38 Vict. c. 57, s. 1.
(*b*) Above, pp. 698, 699.
(*c*) Stats. 3 & 4 Will. IV. c. 27, ss. 3, 24; 37 & 38 Vict. c. 57, s. 1.
(*d*) *Petre* v. *Petre*, 1 Drew. 371, 393; *Toft* v. *Stephenson*, 7 Hare, 1, 14, 15; Cairns, C., *Cunningham* v. *Foot*, 3 App. Cas. 974, 984; Kay, J., *Banner* v. *Berridge*, 18 Ch. D. 254, 233; *Sands to Thompson*, 22 Ch. D. 614, 617; Chitty, J., *Price* v. *Phillips*, 1894, W. N. 213; cf. above, pp. 480, 481, 504, 511.

CHAPTER XIX.

OF THE REMEDIES FOR BREACH OF THE CONTRACT.

§ 1. Of Rescission and Resale.
§ 2. Of claiming Damages under the Contract.
§ 3. Of Specific Performance.
§ 4. Of a Vendor and Purchaser Summons.
§ 5. Of the Purchaser's Remedies for Disturbance after Completion.

Remedies for breach of a contract to sell land.

We will now consider the remedies for breach of a contract to sell land. Where the stipulation broken goes to the whole root of the consideration (*a*)—as on breach of one of the main duties of the contract (*b*)—the injured party's remedies are either to rescind the contract and sue for restitution to his former position, or to affirm the contract and sue either for damages for the breach or for the specific performance of the agreement. Besides these remedies by action, it is open to him to adopt the special mode of procedure by vendor and purchaser summons (*c*). Where a breach has been committed of a stipulation which is not essential, the appropriate remedy is usually an action for damages for the particular breach, but that will not preclude any further proceedings which may be necessary to enforce the main duty of the contract either at law or in equity (*d*). In connection with the remedies for breach of the contract, it will be convenient also to consider the purchaser's remedies in case of his ejectment or disturbance after completion. Apart from fraud and common mistake (*e*), and except where the contract contained an express agreement for compensation so worded as to be applicable to the case (*f*), or where the vendor gave an

(*a*) Above, p. 792.
(*b*) Above, p. 1001.
(*c*) Above, pp. 37, 38.
(*d*) Above, pp. 999, 1004.
(*e*) Above, pp. 575, 614, 766, 789 *sq.*
(*f*) Above, pp. 60, 575, 682-684.

express warranty of his ownership or right to sell the land (*g*), these are to sue upon the vendor's covenants for title, if any (*h*), or to sue upon any other covenants for title of which the benefit runs with the land sold (*i*).

§ 1.—*Of Rescission and Resale.*

Rights of a party rescinding the contract on the other's breach.

It has been pointed out (*k*) that, where either party to the contract commits such a breach of it as discharges the other from his obligation under the agreement, the other is entitled, at his election, either to rescind the contract or to affirm it and sue upon it for damages for the breach (*l*). If he elect to rescind, he is entitled to take active proceedings *in equity* to assert his right and to secure entire restitution (*m*); and he is entitled to

(*g*) Above, pp. 575, 613, 614, 794, 797, 801.
(*h*) Above, pp. 612 *sq.*
(*i*) Above, pp. 618-620; Sug. V. & P. 551.
(*k*) Above, p. 1000.
(*l*) But after the vendor has obtained a decree for specific performance in an action brought by him for that purpose, the purchaser is not entitled, without the leave of the Court, so to rescind the contract for the vendor's failure to show a good title; and his proper course is to move in the action to be discharged from the contract on that ground; *Halkett* v. *Dudley,* 1907, 1 Ch. 590, 601, as to which case see above, pp. 152, n. (*o*), 155, n. (*d*), 491, n. (*x*), 1001, n. (*a*).
(*m*) *Mackreth* v. *Marlar,* 1 Cox, 259; *King* v. *King,* 1 My. & K. 442. It is submitted that the former of these cases establishes that one entitled to rescind a contract for the other party's breach of it may sue as plaintiff in equity to enforce this right, as in case of rescission for a misrepresentation (above, pp. 794, 796), but must, as a rule, make entire restitution. The question, not contested in that case, of an exception occurring in the case of a deposit, is discussed below, pp. 1015-1017, and n. (*f*). In the latter case (approved in *Hope* v. *Hope,* 22 Beav. 351, 365) a purchaser let into possession before completion received notice that it was impossible for the vendor to make a good title, but he declined either to quit possession or to accept such title as the vendor could give and pay the purchase money; and it was held, as he would not accept the latter alternative, that he must give up possession and account for all rents and profits received by him. *A fortiori,* it is thought, a vendor rescinding for the *purchaser's* breach of contract and not being himself in default must be entitled in equity to exact the like restitution as he is bound to make. The right of the injured party to sue as plaintiff for rescission of the contract and consequent reimbursement of expenses incurred was recognised and enforced in *Weston* v. *Savage,* 10 Ch. D. 736, where it was claimed that the agreement was void *and ought to be delivered up to be cancelled* (a relief given under the Court's equitable jurisdiction only); and in *Lee* v. *Soames,* 36 W. R. 884; see above, p. 154, n. (*d*). Also in *Royou* v. *Paul,* 28 L. J. Ch. 555, the purchaser's right to rescind the contract for the vendor's want of title was clearly recognised, and such rescission was held to be a good defence to the vendor's action for specific performance; see *Laughton* v. *Port Erin Commrs.,* 1910, A. C. 565, 569. And in *Brewer* v. *Broadwood,* 22 Ch. D. 105, such rescis-

sue *at law*, independently of the contract, to recover any money paid or property transferred by him thereunder (*n*), and also, it seems, to recover any money necessarily expended by him in discharging any obligation imposed on him by the agreement (*o*). Thus a purchaser rescinding the contract for the vendor's failure to show a good title may recover his deposit, if any, or any other sum paid on account of the purchase money, together with interest thereon at four per cent. per annum (*p*); and a vendor who has delivered over possession before completion and rescinds for the purchaser's failure to pay the price, may recover possession of the land sold. And it appears that either party lawfully rescinding the contract for the other's breach is entitled to recover his expenses incurred in discharge of any obligation imposed on him by the contract, as of the investigation of title (*q*), though it is questionable whether he

sion was considered to be a good defence to the vendor's action for damages for breach of the contract. The equitable right to take active proceedings to rescind a contract of sale for the other party's default is further illustrated where the defendant to an action for specific performance fails to comply with a judgment against him. In this case the plaintiff may, at his election, move in the action to have the contract rescinded and to obtain *restitutio in integrum; Foligno* v. *Martin,* 16 Beav. 586; *Clark* v. *Wallis,* 35 Beav. 460; *Henty* v. *Schröder,* 12 Ch. D. 666; *Hutchings* v. *Humphreys,* 54 L. J. Ch. 650, 652; *Olde* v. *Olde,* 1904, 1 Ch. 35; *Hall* v. *Burnell,* 1911, 2 Ch. 551; Fry, Sp. Perf. §§ 1171-1173, 3rd ed.; see below, § 3 of this chapter at end. The plaintiff may sue *alternatively* for specific performance or rescission, and elect at the hearing which remedy he will take; *Farrant* v. *Olver,* 1922, W. N. 47, 127 L. T. 145.

(*n*) Above, pp. 1000, 1001.

(*o*) *De Bernardy* v. *Harding,* 8 Ex. 822, 824.

(*p*) *Weston* v. *Savage,* 10 Ch. D. 736, 741; *Lee* v. *Soames,* 36 W. R. 884. At law, the deposit or any other sum of money paid on account of the purchase money could only be recovered without interest by a purchaser rescinding the contract in an action for money had and received, unless a written demand claiming payment of interest had been made under stat. 3 & 4 Will. IV. c. 42, s. 28; *Walker* v. *Constable,* 1 Bos. & Pul. 306; *Flight* v. *Booth,* 1 Bing. N. C. 370; *Frühling* v. *Schroeder,* 2 Bing. N. C. 77, 80; 2 Dart, V. & P. 949, 5th ed. But in equity the purchaser rescinding the contract was entitled to have his deposit or any other sum paid on account of the purchase money returned to him with interest at four per cent.; see cases cited above, note (*m*). And under the present practice the purchaser rescinding the contract may recover interest according to the rule of equity without having made any demand or claim under the abovementioned statute; see cases cited above, p. 1001, n. (*a*).

(*q*) *Lee* v. *Soames,* 36 W. R. 884, 885, 886, where the purchaser, suing to rescind, appears to have recovered his expenses of investigating title, erroneously described as damages; *Kitton* v. *Hewett,* 1904, W. N. 21; 2 Dart, V. & P. 945, n. (*b*), 957, n. (*n*), 5th ed.; and consider *Camfield* v. *Gilbert,* 4 Esp. 221, 223; *De Bernardy* v.

Purchaser's lien for the deposit, &c.

is entitled to be recouped his expenses of entering into the agreement (*r*). The purchaser so rescinding the contract has an equitable lien on the land sold for any money paid to the vendor by way of deposit or otherwise on account of the purchase money, and interest thereon (*s*), and also, it seems, for his expenses incurred in pursuance of the contract (*t*). And this lien arises in every case of lawful rescission by the purchaser (*u*), including rescission under a power in that behalf expressly reserved to him by the contract (*x*). The purchaser's lien in these respects is a right exactly similar to and enforceable in the same manner as the vendor's lien for unpaid purchase money (*y*).

Party rescinding a part-performed contract liable to restore anything received thereunder.

As any party rescinding the contract for the other's breach is entitled to be restored to his former position, so, it is conceived, he is in general bound to return to the other any property or profit which he has himself received under the partial execution of the agreement. It is thought that in every case in which a

Harding, 8 Ex. 822, 824; and the facts that such expenses may be recovered by a party rescinding the contract for innocent misrepresentation, and that at common law rescission for an innocent misrepresentation could only take place by way of rescission for breach of an essential stipulation forming part of the contract; above, pp. 790-794, 797, 815, 816; *Carlish* v. *Salt*, 1906, 1 Ch. 335, 341, as to which case see above, pp. 755, n. (*t*), 758, 759, and n. (*m*). And in several cases where, on a vendor and purchaser summons, the contract has been *rescinded* at the purchaser's instance for the vendor's failure to show a good title, the vendor has been ordered to pay the purchaser's costs of investigating the title; *Re Higgins and Hitchman's Contract*, 21 Ch. D. 95; *Re Yeilding and Westbrook*, 31 Ch. D. 344; *Re Hargreaves and Thompson's Contract*, 32 Ch. D. 454; *Re Higgins and Percival*, 59 L. T. 213; *Re Ebsworth and Tidy's Contract*, 42 Ch. D. 23, 53; *Re Bryant and Barningham's Contract*, 44 Ch. D. 218, 222; *Re Hare and O'More's Contract*, 1901, 1 Ch. 93; *Re Walker and Oakshott's Contract*, 1901, 2 Ch. 383, 387.

(*r*) See above, p. 816, and n. (*x*). It may be suggested, however, that the expenses of preparing, stamping and executing a memorandum of the contract, being those of putting the agreement into the form required by law to make it enforceable, are expenses properly incurred *under* the contract, which is not void when concluded by word of mouth only; see above, pp. 9, 10, 841, 842; below, p. 1030. Of course, the expenses of any negotiation preliminary to the conclusion of the contract could not be recoverable; below, p. 1030.

(*s*) *Wythes* v. *Lee*, 3 Drew. 396; *Rose* v. *Watson*, 10 H. L. C. 671; *Whitbread & Co.* v. *Watt*, 1902, 1 Ch. 835.

(*t*) *Kitton* v. *Hewett*, 1904, W. N. 21; *Re Furneaux and Aird's Contract*, 1906, W. N. 215; and cases decided on vendor and purchaser summons and cited above, p. 1013, n. (*q*).

(*u*) Above, p. 815.

(*x*) *Whitbread & Co.* v. *Watt*, 1902, 1 Ch. 835.

(*y*) Above, pp. 990, 995.

party to a contract lawfully rescinds it, whether for the other party's breach of some stipulation, which goes to the root of the whole consideration (*z*), for the other's renunciation of the contract (*a*), for non-fulfilment of some condition subsequent, under an express power to rescind (*b*), or for misrepresentation, duress, or undue influence (*c*), the rule is that he shall not enjoy the advantage of rescission without yielding up every benefit he has taken by the previous part-performance of the contract (*d*). But an exception to this rule occurs, with regard to a deposit paid on a sale of land to the vendor, or his agent, where the vendor lawfully rescinds the contract for the purchaser's breach or renunciation of it. In this case the vendor is generally entitled to retain the deposit, which was paid to him partly as a guarantee for the purchaser's due performance of the agreement, and was intended to be forfeited if the purchaser should break the contract; and the purchaser cannot recover it back from him (*e*). And the vendor is equally

Rescission must, as a rule, be accompanied by *restitutio in integrum*.

Exception in the case of a deposit.

(*z*) Above, pp. 792, 1000.
(*a*) Above, p. 1002.
(*b*) Above, p. 982.
(*c*) Above, pp. 789 *sq.*
(*d*) Above, pp. 982, 983, and n. (*g*), p. 1012, and n. (*m*); *Harrison* v. *Holland*, 1921, 3 K. B. 297, affd. 1922, 1 K. B. 211.
(*e*) *Dunn* v. *Vere*, 19 W. R. 151; *Expte. Barrell*, L. R. 10 Ch. 512; *Howe* v. *Smith*, 27 Ch. D. 89; Farwell, L. J., *Workman, Clark & Co., Ld.* v. *Lloyd Brazileno*, 1908, 1 K. B. 968, 979; *Sprague* v. *Booth*, 1909, A. C. 576, 580; above, p. 27. It is a nice question whether the vendor *rescinding* the contract for the purchaser's breach of it can recover the amount of a deposit stipulated for in the contract, but not actually paid by the purchaser; especially where the contract does not *expressly* provide for forfeiture of the deposit. On the one hand, it seems clear that, where damages are claimed in affirmation of the contract generally or of a special stipulation therein (see below, p. 1020 and n. (*d*)), the amount of an unpaid deposit can be claimed and brought into account; *Ockenden* v. *Henly*, E. B. & E. 485; *Dewar* v. *Mintoft*, 1912, 2 K. B. 373. And it has been held that the purchaser ought not to be allowed, by his own default in complying with a preliminary condition of the contract, to put himself into a better position than if he had performed this term of the agreement; see *Dewar* v. *Mintoft*, 1912, 2 K. B. 373, 387, 388, as to which case see p. 1020, below. This consideration has great weight where there is an *express* condition for payment and forfeiture of the deposit. But on the other hand, it is held that, where a contract is rescinded, the entire agreement between the parties is avoided and no action can be brought, after rescission, to enforce any stipulation contained therein; see above, p. 156, n. (*d*), and cases there cited. It is submitted, however, that, where there is an express stipulation for payment and forfeiture of a deposit, the above consideration should prevail. And if so, it is difficult to see why it should not equally apply where there is a stipulation for payment of a deposit, but no *express* stipulation for its forfeiture. For it is settled that in that case there is an implied stipulation for forfeiture of the deposit on the purchaser's breach; see cases first above cited.

Where a deposit is stipulated for, but not paid.

entitled to the deposit, on rescinding the contract for the purchaser's breach or renunciation of it, where the deposit has been paid to a stakeholder without special provision for its application. In this case also the parties' intention appears to be that the sum deposited shall be held by the stakeholder, not only to abide the event of completion of the contract, but also as a guarantee for the purchaser's due performance of the agreement, and to be forfeited to the vendor if the purchaser make default (*f*). But this exception applies only to money

(*f*) *Hall* v. *Burnell* (Eve, J.), 1911, 2 Ch. 511, holding, as was submitted in the previous editions of this book, that this conclusion follows from the decision and judgments given by the Court of Appeal in *Howe* v. *Smith,* 27 Ch. D. 89, and that the case of *Jackson* v. *De Kadich,* 1904, W. N. 168, was inadvertently decided; *Farrant* v. *Olver,* 1922, W. N. 47, 127 L. T. 145. In *Howe* v. *Smith,* it is important to note, the Court considered that the purchaser had committed such a breach or made such a renunciation of the contract as entitled the vendor to rescind, that the vendor *had elected to rescind,* and that he had resold, *not* under the power of resale in the contract, but *as owner*. In *Jackson* v. *De Kadich,* Farwell, J., declined, on an application made *ex parte* by a vendor lawfully rescinding the contract for the purchaser's default, to make a declaration that he was entitled to a deposit placed as such, but without provision for its application, in a stakeholder's hands. He remarked that the vendor cannot have rescission, and, at the same time, damages for the breach of the contract; and that in *Howe* v. *Smith* there was no rescission. On the latter point, however, he was mistaken, as we have seen. As to his other reason, no doubt the rule is that a vendor cannot at once have rescission and damages for breach: but *Dunn* v. *Vere* and *Howe* v. *Smith,* ubi sup., established that an exception may arise with regard to a deposit paid on a sale, and that, in the absence of stipulation to the contrary, the intention will be implied, from the very nature of a deposit, that it shall be a guarantee for the purchaser's due performance of the contract, and shall be forfeited on his default to the vendor. Can it reasonably be supposed that the parties intended the deposit to be returned to the purchaser in the event of the vendor electing to rescind the contract, when entitled to do so by reason of the purchaser's breach or renunciation of the contract? In *Howe* v. *Smith* the Court of Appeal thought not, where the deposit is paid to the vendor. It is thought that a deposit is placed in a stakeholder's hands for safe custody only pending the happening of some event, in which it is to be paid over to one of the parties; and that, otherwise, a deposit is paid to a stakeholder on the same conditions exactly as it is paid to the vendor himself; *Collins* v. *Stimson,* 11 Q. B. D. 142, 143; see also *Expte. Barrell,* L. R. 10 Ch. 514; Farwell, J., *Hart* v. *Porthgain Harbour Co., Ld.,* 1903, 1 Ch. 690, 696; Farwell, L. J., *Workman, Clark & Co., Ld.* v. *Lloyd Brazileno,* 1908, 1 K. B. 968, 979; *Sprague* v. *Booth,* 1909, A. C. 576; *Shuttleworth* v. *Clews,* 1910, 1 Ch. 176. It is true that in the case of *Mackreth* v. *Marlar,* 1 Cox, 259 (above, p. 1012, n. (*m*)), a vendor, suing in equity for the rescission of the contract on account of the purchaser's default, was decreed to return the deposit, notwithstanding that the contract contained an express provision for its forfeiture; but it does not appear that this point was argued or contested, and it is submitted that in this respect the decision must now be taken to have been overruled by *Howe* v.

Jackson v. *De Kadich.*

paid as a deposit, that is, in earnest or as a guarantee for the payer's due performance of the contract, and does not extend to other sums of money paid on account of the purchase money (*g*). And the question, whether the deposit is to be forfeited on the purchaser's default, is one of the parties' intention to be gathered from the whole agreement; so, if the contract contain any clause inconsistent with such an intention, it will be excluded (*h*). The principle governing the case of the forfeiture on the purchaser's default of a deposit paid by him on signing a contract for the sale of land has been applied where other property is transferred by a party to a contract as a guarantee for his due performance of his agreement. Thus, where a builder had made default in performing a building agreement, containing a stipulation that all plant and materials brought by him on to the land to be built on should be considered the property of the landowner until completion of the contract, it was held that he had no right to recover the property from the landowner (*i*). As we have seen (*k*), the vendor lawfully rescinding the contract for any cause is entitled to have the abstract returned to him, and the purchaser may not keep a copy of it.

Return of abstract.

Where the purchaser has been let into possession or receipt of the rents and profits pending completion on the terms that he shall pay interest on the purchase money as from the date of

Rescission where the purchaser has been in possession.

Smith, ubi sup. And in *Dunn* v. *Vere*, 19 W. R. 151, and *Olde* v. *Olde*, 1904, 1 Ch. 35 (Farwell, J.), a vendor, actively asserting his right to rescind the contract for the purchaser's default, was allowed to retain a deposit paid to him. Besides this, it is held at law that, although a contract of sale be *rescinded* by the exercise of an express power of resale contained therein, any deficiency in price on the resale may nevertheless be recovered from the purchaser under a special stipulation to that effect to be implied in the agreement; *Lamond* v. *Davall*, 9 Q. B. 1030, 1032; below, p. 1020. The above note was approved of and its reasoning adopted by Eve, J., in *Hall* v. *Burnell*, ubi sup.; followed in *Farrant* v. *Olver*, ubi sup.

(*g*) *Palmer* v. *Temple*, 9 A. & E. 508, 520, 521; *Cornwall* v. *Henson*, 1900, 2 Ch. 298, 302, 305; *Kilmer* v. *British Columbia Orchard Lands, Ld.*, 1913, A. C. 319; *Steedman* v. *Drinkle*, 1916, 1 A. C. 275; *Harrison* v. *Holland*, 1921, 3 K. B. 297, affd. 1922, 1 K. B. 211; above, p. 983, n. (*g*).

(*h*) *Palmer* v. *Temple*, 9 A. & E. 508, 520, where a stipulation, that either party making default should pay 1,000*l.* as liquidated damages, was held to exclude any intention that the deposit should be forfeited; *Howe* v. *Smith*, 27 Ch. D. 89, 93, 97.

(*i*) *Hart* v. *Porthgain Harbour Co., Ld.*, 1903, 1 Ch. 690. Cf. *Re Keen*, 1902, 1 K. B. 555.

(*k*) Above, p. 983, n. (*i*).

his entry (*l*), or shall pay the purchase money by instalments, and he afterwards commits a breach of contract giving rise to the right to rescind, the vendor electing to rescind the contract is entitled in equity to be reinstated in possession of the land and to recover any rents or profits received by the purchaser (*m*), but not, it has been held (*n*), to charge him with an occupation rent for any part of the premises which he occupied himself. And it is thought that the vendor would be correspondingly bound to return any money actually paid to him under the agreement either for interest or principal (*o*). It is also conceived that a purchaser, who had been so let into possession and elected to rescind for the vendor's breach of contract, would in equity be similarly liable to deliver up possession of the land and to account for the rents and profits received by him and entitled to recover any sums paid on account of the purchase money (*p*). In these cases the purchaser would not be liable *at law* for the use and occupation of the premises prior to rescission of the contract (*q*). But if he held over after the rescission, he would be so liable (*r*).

Where an order is made authorising entry into possession to satisfy the vendor's lien, after conveyance, that is not rescission of the contract.

Here it may be noted that, where conveyance has been made without payment of the price, and the vendor afterwards brings an action to enforce his lien, and, the land proving unsaleable, obtains an order authorising him to enter into and hold possession (*s*), it appears that the order is really made by way of giving him specific enjoyment of the thing pledged to satisfy his lien and in the nature of foreclosure, and not by way of rescission of the contract involving *restitutio in integrum;* and it does not appear that the purchaser could be required to account for any rents or profits received by him (*t*).

(*l*) Above, pp. 499, 500.

(*m*) *Clark* v. *Wallis,* 35 Beav. 460; above, p. 1012, and n. (*m*).

(*n*) *Hutchings* v. *Humphreys,* 54 L. J. Ch. 650, 652; cf. above, p. 815, and n. (*u*).

(*o*) Above, pp. 1012, and n. (*m*), 1015-1017.

(*p*) See the last two notes.

(*q*) *Winterbottom* v. *Ingham,* 7 Q. B. 611, 619; Sug. V. & P. 179; *Markey* v. *Coote,* 10 I. R. C. L. 149.

(*r*) *Howard* v. *Shaw,* 8 M. & W. 118; *Markey* v. *Coote,* ubi sup.

(*s*) Above, p. 996.

(*t*) Consider *Allgood* v. *Merrybent, &c. Ry. Co.,* 33 Ch. D. 571. It is respectfully submitted that, though the decision in this case was correct, the learned judge was wrong in suggesting that in an ordinary case of vendor's lien (that is, where a conveyance has been executed) the vendor would be entitled to rescind the contract for the purchaser's

Rights of vendor electing to rescind.

Where the vendor lawfully rescinds the contract for the purchaser's breach, he is remitted to his former position as full owner of the land, which was the subject of the contract, and thenceforth may well exercise all rights incident to such ownership, including the power of disposition. He may therefore lawfully resell the land (*u*). But a resale under the liberty of resale arising from the ownership restored to the vendor by his *rescission* of the contract is entirely different both from a resale under a power of resale expressly reserved to the vendor in case of the purchaser's default, and from a resale by a vendor who has *not* rescinded the contract, but resells in order to realise his lien for the price under a power in that behalf alleged to be implied in the contract (*x*). If the vendor resell after he has elected to rescind the contract, he resells in his capacity of *owner* of the land and for his own benefit and at his own risk exclusively. If the land realise a higher price than at the sale rescinded, he is entitled to keep the surplus (*y*); and if the price were lower, he has no right of action against the former purchaser for the difference; for, having once elected to rescind the contract, he can no longer claim to treat it as subsisting and recover damages for its breach (*z*). On the other hand, where the land is resold under an express power of resale on the purchaser's default, the contract is indeed rescinded (*a*) and the vendor at liberty to retain any surplus over the original price (*b*): but if the resale were at a lower price the vendor is

Resale as owner after an election to rescind.

Resale under an express power of resale.

failure to pay the price. It is submitted that in this respect the law is the same for a sale of land as of goods, and that, subject only to the vendor's equitable lien and the remedies for enforcing it, the contract cannot be rescinded *after conveyance* for the purchaser's failure to pay the price; see above, p. 995, and n. (*u*).

(*u*) *Howe* v. *Smith*, 27 Ch. D. 89, in which case it was considered that the reservation in the contract of an express power of resale on the purchaser's default did not prevent the vendor from rescinding the contract in that event and thereafter selling *as owner;* Eve, J., *Hall* v. *Burnell*, 1911, 2 Ch. 551, 555; above, p. 1016, n. (*f*).

(*x*) See above, pp. 48-50, 995, 996, where it is maintained that the better opinion is that, in the absence of express stipulation, the vendor has no power of resale to realise his lien for the price.

(*y*) *Expte. Hunter*, 6 Ves. 94, 97; Sug. V. & P. 39; dealing with the case of a resale under an express power, which rescinds the contract; above, p. 50, and n. (*m*). The same law applies *à fortiori*, in the case of a resale as owner after an election to rescind.

(*z*) Above, p. 1004; *Henty* v. *Schroeder*, 12 Ch. D. 666; and consider *Harding* v. *Harding*, 4 My. & Cr. 514, 520; *Lamond* v. *Davall*, 9 Q. B. 1030; Sug. V. & P. 39-41; Benjamin on Sale, 648, 2nd ed.

(*a*) Above, pp. 50, n. (*m*), 982.

(*b*) Above, n. (*y*).

entitled to recover the difference from the purchaser, *not* as general damages for breach of the contract, but under a special stipulation to that effect expressed (*c*) or to be implied in the agreement (*d*). Where these stipulations are incorporated in the contract, and the resale is at a lower price, the deposit, if any, must be applied as far as it will go in satisfaction of the difference in price on the resale, notwithstanding that the contract expressly provide that the deposit shall be forfeited on the purchaser's default (*e*). It has been held, however, in a case where a vendor of land was suing under an express stipulation for forfeiture of the deposit on the purchaser's default, and for resale and recovery of the difference in price on and the expenses of the resale, *after taking into account the deposit*, and the purchaser had not paid the deposit, and the amount of the deposit was greater than that of the loss on the resale, that the vendor was entitled to recover the amount of the deposit, in lieu of the amount of his actual loss by the resale (*f*). It is thought that, where an increased price is obtained on the resale, the vendor is entitled to keep the surplus without account-

Dewar v. *Mintoft.*

(*c*) Above, pp. 62, 63, 67.

(*d*) *Lamond* v. *Davall*, 9 Q. B. 1030, 1032; Benjamin on Sale, 648, 2nd ed.

(*e*) *Ockenden* v. *Henly*, E. B. & E. 485; approved by Fry, L. J., in *Howe* v. *Smith*, 27 Ch. D. 89, 104, 105; *Shuttleworth* v. *Clews*, 1910, 1 Ch. 176, pointing out that the order in *Griffiths* v. *Vezey*, 1906, 1 Ch. 796, was in this respect wrongly drawn up.

(*f*) *Dewar* v. *Mintoft*, 1912, 2 K. B. 373. It seems questionable whether this decision was correct; as it is hardly consistent with principle that a vendor affirming the contract and suing for damages thereunder should not treat a deposit paid as a payment of part of the purchase money to be brought into account as such. In that case the question which chiefly occupied the attention of the Court was, whether any contract had in fact been concluded; the case of *Ockenden* v. *Henly* was not cited; the learned judge appears to have overlooked the express stipulation that the deposit should be brought into account; and the case of *Wallis* v. *Smith*, 21 Ch. D. 243, on which he relied for his decision, was one in which it was expressly provided that the amount of the deposit should be forfeited, *or if not paid, should be forfeited and paid as liquidated damages*, and it was considered that in the circumstances of the case the amount of the deposit was recoverable *as liquidated damages*. But there is no doubt that, if in *Dewar* v. *Mintoft* the deposit had actually been paid, the vendor would have been entitled to retain it, on *rescinding* the contract, instead of claiming damages thereunder. And perhaps *Dewar* v. *Mintoft* ought to be treated as a decision that, where a deposit is stipulated for and is not paid, the vendor is entitled to recover the amount thereof, so that he may *then* rescind the contract and keep the deposit as forfeited; see above, p. 1016, n. (*f*). But if that were the vendor's demand, it is thought that the judge should have directed his claim to be amended accordingly.

ing for the amount of the deposit; for the contract is rescinded by the resale, and the purchaser, having broken the contract, is precluded by his own default from recovering the deposit (*g*). A resale made to enforce the vendor's lien, either by the vendor himself affirming the contract and claiming an implied power to resell for the purpose (*h*), or under an order of the Court obtained at the vendor's instance (*i*), is like a sale made by a pledgee of goods to recoup himself (*j*). The contract is not thereby rescinded (*k*); any surplus in price obtained on the resale belongs to the purchaser (*l*); and if the land be resold at a lower price, the vendor may recover the difference in an action on the contract claiming general damages for the purchaser's breach (*m*).

Resale to enforce the vendor's lien.

If, on a sale of land, the purchaser have notice that the vendor has entered into a prior contract for sale thereof, which has not been carried out, and the vendor claim to have lawfully rescinded that contract for the default of the other party thereto, the purchaser must, of course, require very clear evidence that the prior purchaser has committed such a breach of the contract as justified the vendor in rescinding it (*n*). If the fact be at all doubtful he should refuse to accept the title, for, having notice of the prior contract, he will be bound thereby, in case it be still subsisting and enforceable (*o*). And unless the vendor can prove the fact to be reasonably certain, he cannot oblige the purchaser to accept the title, even at law; still less can he enforce the second contract specifically (*p*). The same principles apply where the vendor claims that the prior contract was lawfully rescinded by him under an express power of rescission, or was otherwise discharged (*q*); in each case strict proof must be required of the facts alleged to have extinguished the obligation of the prior contract. If the vendor claim to

Title under a sale by a vendor reselling.

(*g*) See above, pp. 546, 1019, and n. (*y*); Sug. V. & P. 40, 41; *Howe* v. *Smith*, 27 Ch. D. 89.
(*h*) See above, pp. 48-50, 1019, and n. (*x*).
(*i*) Above, pp. 49, 996.
(*j*) Above, p. 49.
(*k*) *Harding* v. *Harding*, 4 My. & Cr. 514; above, p. 49.
(*l*) Above, p. 50.
(*m*) See above, p. 49, n. (*k*); below, p. 1023.
(*n*) Above, pp. 1000-1002, 1011, 1012.
(*o*) Above, p. 535.
(*p*) Above, pp. 122, 123.
(*q*) Above, pp. 975 *sq.*

be reselling under a power of resale expressly reserved to him by the prior contract (*r*), the purchaser must require equally clear evidence that the event has occurred in which the power of resale was to become exercisable (*s*), and should observe equal caution in accepting the title. The case is similar to that of a mortgagee selling under his power of sale, but there are not usually any special stipulations to protect the purchaser in the event of an improper exercise of the power (*t*). If the vendor claim to be reselling under a power of resale alleged to be impliedly reserved to him by the prior contract, and that contract contain no special stipulations from which such a power might reasonably be implied, the purchaser is advised not to accept the title (*u*).

§ 2.—*Of claiming Damages under the Contract.*

Remedy by action for damages at law.

We have seen that every breach of a contract to sell land results in a right of action at law to recover damages for the breach (*v*); and that, where the breach is of an essential stipulation, the injured party, if he do not choose to rescind the contract, may affirm it and sue for damages for the breach or else for the specific performance of the contract (*x*). We will now consider what damages are recoverable by either party in case of his election, on the other's breach of contract, to affirm the agreement and to pursue his remedy for damages at law. It appears that this is to be determined by the general rule of the common law with respect to the damages recoverable for breach of contract, as qualified by the decisions in *Flureau* v. *Thornhill* (*y*) and *Bain* v. *Fothergill* (*z*), that where the breach complained of arises from the vendor's inability (without his own fault) to show a good title, the purchaser is not entitled to any damages for the loss of his bargain (*a*). The general rule of the common law is that, where a party sustains a loss by reason of a breach of contract, he is, so far

What damages are recoverable.

The general rule as to damages.

(*r*) Above, pp. 62, 63, 67, 1019, 1020.
(*s*) Above, pp. 276 *sq.*
(*t*) Above, pp. 313 *sq.*
(*u*) See above, pp. 48-50, 1019, and n. (*x*).
(*v*) Above, p. 999.
(*x*) Above, pp. 1000, 1001, 1009, 1011.
(*y*) 2 W. Black. 1078.
(*z*) L. R. 7 H. L. 158; above, p. 36.
(*a*) Parke, B., *Robinson* v. *Harman*, 1 Ex. 850, 855.

as money can do it, to be placed in the same position, with respect to damages, as if the contract had been performed (*b*). But this rule must be read in connection with the principle that the damages recoverable for breach of contract "should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it" (*c*).

Damages recoverable by the vendor.

The vendor's right to damages is governed by the general rule; he is entitled to substantial compensation for the purchaser's failure to fulfil the bargain, as in the case of a sale of goods (*d*). But if the purchaser break the contract, as by refusal to accept a good title, duly proved (*e*), or by failure to pay the price before the vendor has parted with his estate in the land, the vendor cannot recover the whole price as damages, but is limited to the loss which he has actually sustained (*d*), that is to say, the difference, if any, between the price agreed to be paid and the value of the land as remaining on his hands at the date of the breach, and considered as a security for realising the deficiency in the sum which the purchaser contracted to pay (*f*). And this is equally the case where the purchaser has been put into possession without any conveyance being executed, for the vendor then retains his legal estate in the land, and is, consequently, entitled to resume possession on

Where the purchaser has been in possession.

(*b*) Ibid.; *Wall* v. *City of London Real Property Co.*, L. R. 9 Q. B. 249, 253; *Chaplin* v. *Hicks*, 1911, 2 K. B. 786, 794; *British Westinghouse, &c. Ld.* v. *Underground Electric, &c., Ld.*, 1912, A. C. 673, 689; and consider *Re Daniel*, 1917, 2 Ch. 405, 411, 412. These *dicta* in *Robinson* v. *Harman* appear to be good law (see *Wigsell* v. *School for Indigent Blind*, 8 Q. B. D. 357, 364; Atkinson, L. A., *Addis* v. *Gramophone Co., Ltd.*, 1909, A. C. 488, 494, 495); but the decision in that case was overruled by *Bain* v. *Fothergill*.

(*c*) *Hadley* v. *Baxendale*, 9 Ex. 341, 354; and see *H.M.S. London*, 1914, P. 72, 77 *sq.*

(*d*) *Laird* v. *Pim*, 7 M. & W. 474, 478; *Noble* v. *Edwardes*, 5 Ch. D. 378; *Keck* v. *Faber*, 60 Sol. J. 253; and see an article by the author in 60 Sol. J. 287, 303.

(*e*) See *Lethbridge* v. *Kirkman*, 25 L. J. Q. B. 89.

(*f*) See above, note (*d*); *Barrow* v. *Arnaud*, 8 Q. B. 604, 609, 610; Benjamin on Sale, 617, 618, 2nd ed.; *Williams Bros.* v. *Ed. T. Agius, Ld.*, 1914, A. C. 510; *Jamal* v. *Moolla Dawood, Sons & Co.*, 1916, 1 A. C. 175; and consider *Noble* v. *Edwardes*, 5 Ch. D. 378; and see below, p. 1026.

the purchaser's breach of contract (*g*). Where the purchaser has been let into possession before completion on the terms that he shall pay interest on the purchase money from the time of his taking possession (*h*), and he afterwards commits a breach of the contract, the vendor affirming the agreement will be entitled to recover the interest as damages, and the purchaser to keep any ordinary casual profits received by him during his possession: but where the purchaser has obtained profits by any act of waste, though committed in accordance with the agreement, the vendor may recover damages for the consequent deterioration in value of the inheritance remaining on his hands (*i*). If a deposit were paid, and the purchaser commit a breach of contract, the vendor affirming the contract cannot claim to retain the deposit as *forfeited*, and to be paid, *in addition*, his full measure of damages for the breach: but he is entitled to keep the deposit or recover it from a stakeholder (*k*) *in part payment* of the price, and to recover the damages, if any, which he has sustained by the breach, after taking into account, to the purchaser's credit, the payment of the deposit. And this is the case, although the contract expressly provide that, on the purchaser's failure to comply with the conditions thereof, the deposit shall be forfeited (*l*); for any such stipulation would be construed as conferring only the right to treat the deposit as forfeited on *rescission* of the contract (*m*). A

Where a deposit has been paid.

(*g*) *Laird* v. *Pim*, 7 M. & W. 474, 478; *Moor* v. *Roberts*, 3 C. B. N. S. 830, 844. See above, pp. 481, 492, 499-502, 1017, 1018, and n. (*r*).

(*h*) Above, pp. 499, 500.

(*i*) *Laird* v. *Pim*, 7 M. & W. 474; see above, pp. 492, 500; and cf. above, p. 1017.

(*k*) Above, pp. 27, 28, 1016, and n. (*f*).

(*l*) Above, p. 67.

(*m*) Consider *Ockenden* v. *Henly*, E. B. & E. 485; *Howe* v. *Smith*, 27 Ch. D. 89, 104, 105; *Shuttleworth* v. *Clews*, 1910, 1 Ch. 176; above, pp. 1017, 1021. In *Essex* v. *Daniell*, L. R. 10 C. P. 538, the vendor suing *generally* for damages, in affirmation of a contract containing the above stipulation, was allowed to retain his deposit and to recover as damages the amount of his expenses incurred in the abortive sale as well. It is respectfully submitted, however, that this decision was incorrect, and that the learned judges mistakenly applied to the case of a claim for damages in *affirmation* of the contract the principles properly applicable in the case of *rescission* of the contract; see above, p. 1013, and n. (*q*). Lord Coleridge, C. J., there distinguished the case of *Ockenden* v. *Henly* on the ground that in that case the deposit had not been paid and there had been a resale and the action was to recover the amount of the loss on the resale. But it is respectfully submitted that if, as held in *Ockenden* v. *Henly* and approved in *Howe* v. *Smith*, the deposit must be brought into account where there has been a resale,

Essex v. *Daniell.*

similar stipulation for forfeiture of the deposit *as liquidated damages* does not preclude the vendor from suing for damages for any loss sustained by him after giving credit for the amount of the deposit (*n*). Where the vendor has executed a conveyance without receiving payment of the entire purchase money (*o*), he can sue for the whole amount remaining unpaid in the event of the purchaser's omission to pay it as agreed. In that event the amount due becomes a debt, and is recoverable accordingly (*p*).

Where a conveyance has been executed.

If, on the purchaser's breach of contract, the vendor affirm the agreement and sue for damages thereunder, it does not appear that he can recover his expenses of entering into the agreement or proving title (*q*), for, as we have seen (*r*), he is entitled to substantial damages for loss of his bargain on the footing of being placed, as far as money can do it, in as good a position as if the contract had been carried out. But if the contract had been completed, he would have had to bear his own expenses; and to allow him to recover his expenses, *in addition* to compensation for his loss, would be to place him in a *better* position by reason of the breach of contract than he would have occupied if the agreement had been carried out (*s*). It is thought, however, that a vendor left in possession of the

As to the vendor's expenses of the sale.

which rescinds the contract, and where the damages are only recoverable under the special stipulation and not as general damages for the breach (see above, pp. 1019, 1020, and n. (*d*)), *à fortiori* a deposit paid ought to be brought into account where the action is brought to recover general damages for a breach of the contract. As to the case of *Dewar* v. *Mintoft*, 1912, 2 K. B. 373, see above, p. 1020, and n. (*f*). It will be observed that in that case no claim seems to have been made, as in *Essex* v. *Daniell*, to have the amount of the deposit and damages *as well*.

(*n*) *Icely* v. *Grew*, 6 N. & M. 467.

(*o*) Above, p. 990.

(*p*) Above, pp. 990, 999; Benjamin on Sale, 622, 2nd ed.

(*q*) Observe the items of the damages recovered in *Laird* v. *Pim*, 7 M. & W. 474, 477, 478; cf. above, pp. 1013, 1014.

(*r*) Above, p. 1023.

(*s*) It is clear that, if the vendor execute a conveyance without payment, his lien extends only to the price and interest thereon, and he has no claim to be recouped his expenses. Consider cases cited above, pp. 990, 991. And it is thought that the same principle is applicable where the vendor is not entitled to recover the whole price as damages. See *Faber* v. *Keck*, 60 Sol. J. 253, and the author's article in 60 Sol. J. 287, 303; below, pp. 1032, 1033; *Re Daniel*, 1917, 2 Ch. 405, 412. In *Essex* v. *Daniell*, L. R. 10 C. P. 538, the vendor affirming the contract was allowed to recover his expenses of proving title as part of his damages: but it is respectfully submitted that this decision was wrong; see above, note (*m*), p. 1024.

As to the expenses of raising the sum which the purchaser contracted to pay.

land sold, through the purchaser's breach of the contract, and suing for damages for the breach, should be allowed to recover, besides the amount of any actual fall in the value of the land between the date of the contract and that of the breach, the estimated amount of the expenses of raising by sale the deficiency in the sum of money which the purchaser contracted to pay. Otherwise the vendor would certainly not be put in as good a position as if the contract had been performed, especially where there has been no fall in the value of the land at the date of the breach (*t*). If this view be correct, then the true measure of the vendor's damages for the purchaser's breach of the contract is the difference between the contract price and the value at

The true measure of the vendor's damages.

(*t*) See above, p. 1025. Thus if the land had been sold for 1,000*l.*, and the expenses of sale had been 50*l.*, and the land still remained worth 1,000*l.* on the purchaser's breach, the vendor would not be in as good a position as if the contract had been performed if he were left with the land on his hands and recovered nominal damages only. What he was to have by the purchaser's performance of the contract was 1,000*l. in money:* but to get this he would now have to expend, say, 50*l.* more on a resale. The estimated amount of the expenses of a resale seems therefore to be the right measure of the damages in this case. This is shown, it is submitted, by the facts that the vendor is bound to do all he can to mitigate the damages, and that if there be a resale at a loss the measure of damages is the amount of the loss *plus* the expenses (not of the original sale) but of the resale; see *Expte. Hunter,* 6 Ves. 94; Sug. V. & P. 39; *Ockenden* v. *Henly,* E., B. & E. 485; above, p. 1024, and n. (*m*). So, if a sale be ordered to satisfy a vendor's lien (above, p. 993) the vendor is entitled to receive the amount due on his lien, after first satisfying the expenses of the sale. And where under a contract to sell goods or shares, broken by the purchaser's refusal to accept them, the vendor resells to mitigate the damages recoverable, what he has to bring into account is the *net* price on the resale, after deducting the necessary expenses thereof, such as brokerage or commission; see Benjamin on Sales, 654, 2nd ed.; *Rodocanachi* v. *Milburn,* 18 Q. B. D. 67; *British Westinghouse, &c., Ld.* v. *Underground Electric, &c., Ld.,* 1912, A. C. 673, 689 *sq.* It does not appear, however, that any allowance was made for this item in *Keck* v. *Faber,* 60 Sol. J. 253: but the principle was admitted in that case that the vendor is entitled to recover as damages the amount by which his expenses have been increased owing to the purchaser's breach of contract; see the author's article in 60 Sol. J. 303. And it is thought that the recovery of the estimated expenses of a resale is consistent with this principle. The reflection may perhaps occur that the difference between recovering, as damages, the actual expenses of the original sale and the estimated expenses of a resale is a very fine distinction, especially where the amount of each is the same. But it is submitted that there is an important difference in principle between the consequences of rescinding a contract and those of affirming it and suing for damages thereunder; see above, pp. 1001, and n. (*x*), 1012. And the cases of *Essex* v. *Daniel, Jackson* v. *De Kadich,* and *Dewar* v. *Mintoft* show what difficulties and confusion are introduced when the right legal principles are lost sight of; see above, pp. 1016, n. (*f*), 1020, n. (*f*), 1024, n. (*m*).

the date of the breach of the land remaining on the vendor's hands, *when regarded as a security for realising the deficiency in the sum of money which the purchaser contracted to pay;* that is to say, after taking into account the necessary expenses of raising out of the land the amount of such deficiency.

What damages are recoverable by the purchaser.

The purchaser's right to damages for breach of the contract is governed by the special rule that, where the breach of the contract is occasioned by the vendor's inability, without his own fault, to show a good title, he shall be entitled to recover, as damages, his deposit, if any, with interest, and his expenses incurred in connection with the agreement, but not more than nominal damages for loss of his bargain (*u*). Subject to this special rule, however, the purchaser's right appears to be regulated by the general law (*v*). The reason given for the rule in *Flureau* v. *Thornhill* (*x*) is that, owing to the difficulties and uncertainty of the English law of real property, the parties to a sale of land must be taken to have contracted on the understanding that, if the purchase goes off because of the vendor's inability to make a good title, the purchaser shall only be recouped the expenses he has incurred, and shall not recover any other damages (*y*). This rule applies in every case where the vendor's breach of the contract is owing to his inability, without his own fault, to make a good title, even though he had expressly or impliedly (*z*) represented, contrary to the fact but without fraud, that he *had* a good title (*a*). Thus, where the owner of leaseholds not assignable without the lessor's licence

Bain v. *Fothergill.*

(*u*) *Flureau* v. *Thornhill,* 2 W. Black. 1078; *Sikes* v. *Wild,* 1 B. & S. 587, 4 B. & S. 421; *Bain* v. *Fothergill,* L. R. 7 H. L. 158; *Re Daniel,* 1917, 2 Ch. 405, 408; *Braybrooks* v. *Whaley,* 1919, 1 K. B. 435, 438; *Keen* v. *Mear,* 1920, 2 Ch. 574, 581. This rule also applies to contracts to grant a lease of land in which the lessor undertakes to show a good title; *Robinson* v. *Harman,* 1 Ex. 850; *Hanslip* v. *Padwick,* 5 Ex. 615; *Gas Light and Coke Co.* v. *Towse,* 35 Ch. D. 519, 543; *Pease* v. *Courtney,* 1904, 2 Ch. 503, 511, 512; see above, p. 90, n. (*m*).

(*v*) *Engel* v. *Fitch,* L. R. 4 Q. B. 659; *Day* v. *Singleton,* 1899, 2 Ch. 320; *Re Daniel,* 1917, 2 Ch. 405, 410.

(*x*) 2 W. Black. 1078.

(*y*) *Bain* v. *Fothergill,* L. R. 7 H. L. 158, 207, 210.

(*z*) Above, pp. 613, 614, 809.

(*a*) *S. C.,* overruling *Hopkins* v. *Grazebrook,* 6 B. & C. 31, and *Robinson* v. *Harman,* 1 Ex. 855, which decided the contrary; *Keen* v. *Mear,* 1920, 2 Ch. 574, 581. The innocent misrepresentation is not a cause of action for damages; above, p. 804.

has sold them without mentioning this restriction (*b*), and the lessor has refused to give his consent to the sale, the purchaser can recover no damages beyond his expenses (*c*). But the rule in question is only applicable where the vendor's breach of contract arises from his inability to make a good title after he has made an honest effort to discharge his obligation in this respect, and has done all that lies within his own power to carry out the agreement (*d*). For example, where an owner of leaseholds not assignable without the lessor's licence had sold them subject to his consent to the assignment being obtained (*e*), and, instead of endeavouring to procure the lessor's licence, actually induced him to refuse it, it was held that the purchaser was entitled to recover substantial damages for the vendor's breach of duty (*f*). And it appears that, where the vendor's breach of contract consists in his wilful refusal or neglect to take the steps proper to prove his title, as to deliver an abstract, he would be liable to pay substantial damages (*g*). So, if the vendor commit a breach of his duty to convey the land sold or to put the purchaser in possession (*h*), and the breach be caused, not by his inability to make a good title, but by his wilful refusal or neglect to do some act, which lies entirely within his own power and is necessary to discharge his obligation in these respects, the purchaser is entitled to recover damages for loss of his bargain to be calculated according to the general principle of the law (*i*). Thus, where mortgagees sold the mortgaged land, with vacant possession, under their power of sale, and the mortgagor was in possession and they deliberately omitted to eject him, and were therefore unable to hand over possession at the time for completion, it was held that the purchaser was entitled to recover substantial damages for his loss,

Day v. *Singleton.*

Engel v. *Fitch.*

(*b*) Above, pp. 348-350.

(*c*) *Bain* v. *Fothergill,* ubi sup.; see also *Pease* v. *Courtney,* 1904, 2 Ch. 503.

(*d*) See Turner, L. J., *Williams* v. *Glenton,* L. R. 1 Ch. 200, 209; *Re Daniel,* 1917, 2 Ch. 405; *Braybrooks* v. *Whaley,* 1919, 1 K. B. 435.

(*e*) Above, pp. 349, and n. (*f*), 981.

(*f*) *Day* v. *Singleton,* 1899, 2 Ch. 320.

(*g*) Consider *Jones* v. *Gardiner,* 1902, 1 Ch. 191. *Quære,* whether this principle should not have been applied in *Compton* v. *Bagley,* 1892, 1 Ch. 313.

(*h*) Above, pp. 545, 574, n. (*e*).

(*i*) *Engel* v. *Fitch,* L. R. 4 Q. B. 659; *Godwin* v. *Francis,* L. R. 5 C. P. 295, 306, 308; *Day* v. *Singleton,* 1899, 2 Ch. 320, 329, 332-334; and consider *Cornwall* v. *Henson,* 1900, 2 Ch. 298; *Jones* v. *Gardiner,* 1902, 1 Ch. 191.

and that the measure of damages was the difference between the contract price and the value of the land at the time of the breach of contract; and the purchaser having resold the land at an advanced price, it was considered that, in the absence of any other evidence, the price at which the purchaser resold might be taken to be the value of the land; and the purchaser recovered accordingly the amount of the profit on the resale (*j*). So, where the property sold was subject, together with other property, to a mortgage for a sum greater than the purchase money, and the vendor failed to obtain the mortgagor's concurrence in the conveyance, it was held that the vendor was bound to pay substantial damages to the purchaser for his loss of the bargain (*k*). It should be noted, however, that, although a vendor, who has contracted to give vacant possession, is bound at his peril to eject a tenant by sufferance (*l*), a tenant at will or a trespasser (*m*), who refuses to give up possession, he is not obliged to engage in litigation with persons asserting in good faith and with apparent or reasonably possible right claims adverse to his title (*n*). And it is thought that, if he preferred to renounce the contract rather than engage in such litigation, he could not be cast in substantial damages. And where his title is imperfect, he is of course not liable to pay substantial damages if he decline to buy in any outstanding estate or incumbrance. Such an act as this would depend on others' consent, and does not lie entirely within his own power (*o*).

Re Daniel.

A purchaser affirming the contract for sale and claiming damages for the vendor's breach of the agreement is entitled, as we have seen (*p*), to recover his deposit, with interest. And

As to the deposit and other purchase money paid.

(*j*) See previous note.

(*k*) *Re Daniel,* 1917, 2 Ch. 405. The same principle was applied in *Braybrooks* v. *Whaley,* 1919, 1 K. B. 435, where the vendor, a mortgagee selling under his power of sale, took no steps to obtain the order requisite under the Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. V. c. 78), s. 1; above, p. 327.

(*l*) A mortgagor in possession is in the position of a tenant by sufferance at law; notes to *Keech* v. *Hall,* 1 Smith, L. C.; Wms. Real Prop. 604, and n. (*b*), 23rd ed.

(*m*) Above, pp. 488, 492.

(*n*) Turner, L. J., *Williams* v. *Glenton,* L. R. 1 Ch. 200, 208.

(*o*) See above, pp. 150-154.

(*p*) Above, p. 1027; *Compton* v. *Bagley,* 1892, 1 Ch. 313, 321; *Day* v. *Singleton,* 1899, 2 Ch. 320; Sug. V. & P. 362, 639; *Re Daniel,* 1917, 2 Ch. 405, 406-408; *Keen* v. *Mear,* 1920, 2 Ch. 574, 582.

if the deposit were paid to an auctioneer or other stakeholder, he can recover interest thereon, as damages, from the vendor (*q*). The purchaser may also claim, as damages, to be recouped, with interest, any other sums he may have paid on account of the purchase money, beyond the deposit (*r*), or to be compensated for any other property, which he may have parted with, or for any act done to his detriment as part of the consideration for the sale. For where land is agreed to be conveyed for any consideration immediately executed in favour of the person promising to convey, it is impossible to suppose that the parties contracted on the understanding implied in cases like *Flureau* v. *Thornhill* (*s*), where the contract is executory on both sides; and the other party is entitled, as regards the executed consideration, to be placed, as far as damages can do it, in as good a position as if the contract had been carried out (*t*). It appears, however, that if in such a case the purchaser bought with full notice of the state of the vendor's title (*u*), and the vendor were prevented from carrying out the contract by a defect in the title and not by his own fault, the purchaser affirming the contract would not be entitled to more than nominal damages for loss of his bargain (*x*).

Expenses recoverable by the purchaser as damages.

Where the purchaser affirming the contract has the right to recover his expenses as damages, he is entitled to be recouped his expenses of preparing, stamping and executing the written memorandum of the contract (*y*), as well as those properly incurred in carrying out the agreement for sale. And under the latter head he may recover his costs of investigating the title (*z*) and searching for incumbrances (*a*), or, if the vendor's breach

(*q*) *Farquhar* v. *Farley*, 7 Taunt. 592. As we have seen, the stakeholder himself is not liable to pay interest on the deposit, though he is bound to return the sum deposited to the purchaser on the vendor's breach of the contract; above, pp. 27, 28.

(*r*) Consider *Sherry* v. *Oke*, 3 Dow. P. C. 349, 361; *Cornwall* v. *Henson*, 1900, 2 Ch. 298.

(*s*) Above, p. 1027.

(*t*) *Strutt* v. *Farlar*, 16 M. & W. 249; *Wall* v. *City of London Real Property Co.*, L. R. 9 Q. B. 249; above, pp. 1022, 1023.

(*u*) Above, p. 188.

(*x*) Consider *Gas Light and Coke Co.* v. *Towse*, 35 Ch. D. 519, 543.

(*y*) *Hanslip* v. *Padwick*, 5 Ex. 615.

(*z*) Above, p. 1027, n. (*u*); *Richards* v. *Barton*, 1 Esp. 268; *Hanslip* v. *Padwick*, *Compton* v. *Bagley*, ubi sup.; *Keen* v. *Mear*, 1920, 2 Ch. 574, 582.

(*a*) *Hodges* v. *Litchfield*, 1 Bing. N. C. 492, 499; Sug. V. & P. 362.

did not occur until after the acceptance of the title (*b*), the costs of preparing the conveyance (*c*). And the purchaser may recover the costs due from himself to his solicitor in respect of these items, although the solicitor's bill have not been paid (*d*). But the purchaser cannot recover any expenses which were purely preliminary to entering into the agreement for sale; as of any negotiations leading up to the sale, or of a survey or a valuation made before the sale for his own information (*e*). Nor can he get back any expenses of carrying out the agreement, which have been prematurely incurred. Thus, the purchaser is not justified in preparing a conveyance until the vendor has shown such a title as he is bound to accept; and if he do so before that time, he cannot recover the expense of it in case the vendor fail to show such a title and so break the contract (*f*). So also he should not get the land surveyed until a good title has been shown, and cannot charge against the vendor the expenses of a survey prematurely made (*g*). But if the land were surveyed after a good title had been shown on the abstract, it is thought that the expense of the survey would be properly incurred (*h*), and would therefore be recoverable in case of a *subsequent* breach of the contract. The purchaser cannot recover, as expenses, any loss or outlay incurred in raising the purchase money; as a loss by selling any stock, shares or securities to provide the money (*i*), or the costs or charges of borrowing the money (*k*): but if before the breach the contract had proceeded to such a point that it was reasonable for the purchaser to have the money ready to complete the purchase, he may recover, as damages, interest on any money so lying idle, whether it were actually raised or were only held ready

(*b*) Above, p. 546.

(*c*) Sug. V. & P. 362; 2 Dart, V. & P. 949, 5th ed.; 1076, 6th ed.; 990, 7th ed.

(*d*) *Richardson* v. *Chasen*, 10 Q. B. 756.

(*e*) *Hodges* v. *Litchfield*, 1 Bing. N. C. 492, 498; Sug. V. & P. 362. But on sales under the direction of the Court, the purchaser is entitled to be restored entirely to his former position as regards any expenses incurred by him, and may therefore recover, as damages, all costs occasioned by his having bid for and become the purchaser of the property so sold; *Holliwell* v. *Seacombe*, 1906, 1 Ch. 426.

(*f*) *Jarmain* v. *Egelstone*, 5 Car. & P. 172; *Hodges* v. *Litchfield*, 1 Bing. N. C. 492, 499; Sug. V. & P. 362.

(*g*) Sug. V. & P. 362.

(*h*) Above, p. 575; Sug. V. & P. 362.

(*i*) *Flureau* v. *Thornhill*, 2 W. Black. 1078.

(*k*) *Hanslip* v. *Padwick*, 5 Ex. 615.

by a third party to be applied to the purchaser's use at call (*l*). The purchaser cannot recover the extra costs as between solicitor and client of an action for specific performance of the contract brought against him by the vendor and dismissed with costs as between party and party (*m*), or his own costs of an action for specific performance brought by himself and dismissed without costs on the vendor's failure to prove a good title (*n*). Where the purchaser has been let into possession pending completion, with liberty to do repairs or make alterations or improvements at his own expense, he cannot recover any money so spent among his expenses of carrying out the agreement (*o*). *A fortiori,* he cannot recover any money so spent, where he did the repairs or made the improvements without any express agreement with the vendor authorizing him to do so (*p*). But he has been allowed to recover the amount of a premium paid, on the faith of the contract, for insuring the property against fire (*q*). If the purchaser choose to incur any expenses in assumed furtherance of the agreement after he has been made aware of a definite breach of contract on the vendor's part, he must pay them out of his own pocket and cannot charge the vendor therewith, as damages (*r*).

Whether the purchaser can recover his expenses where he is allowed substantial damages for loss of his bargain.

A question arises, whether the purchaser is entitled to get back his expenses in connection with the agreement in a case where he is allowed to recover substantial damages for the vendor's breach of contract. It is submitted that he is not. It is true that in the case of *Engel* v. *Fitch* (*s*), above stated, the purchaser was actually allowed to recover damages for loss of

(*l*) *Sherry* v. *Oke,* 3 Dow. P. C. 349, 361; Sug. V. & P. 237, 362, 640. Cf. *Keen* v. *Mear,* 1920, 2 Ch. 574, 582, where it seems that the contract had not proceeded to such a point.

(*m*) *Hodges* v. *Litchfield,* 1 Bing. N. C. 492.

(*n*) *Malden* v. *Fyson,* 11 Q. B. 292; *Keen* v. *Mear,* 1920, 2 Ch. 574, 582; see above, p. 83, and n. (*d*).

(*o*) *Bratt* v. *Ellis,* Sug. V. & P. 812; *Worthington* v. *Warrington,* 8 C. B. 134.

(*p*) See above, pp. 499, 500.

(*q*) *Keen* v. *Mear,* 1920, 2 Ch. 574, 582.

(*r*) *Pounsett* v. *Fuller,* 17 C. B. 660; *Sikes* v. *Wild,* 1 B. & S. 587, 590, 4 B. & S. 421, 424.

(*s*) L. R. 4 Q. B. 659; above, p. 1028. And in *Godwin* v. *Francis,* L. R. 5 C. P. 295, it was admitted, apparently on the authority of *Engel* v. *Fitch,* that a purchaser entitled to damages for loss of his bargain should recover his expenses of investigating title as well. But it appears to have been overlooked that this would place him in a better position than if the contract had been carried out.

his bargain in addition to his expenses of investigating title, &c.: but this appears to have been owing to the form in which the question was presented to the Court. The vendor had paid into Court enough to satisfy the purchaser's expenses; and at the trial a verdict was taken *by consent* for the plaintiff, who was the purchaser, for the amount of the profit on his resale *beyond* the money paid into Court, with leave to move to enter the verdict for the defendant. A rule *nisi* was accordingly obtained and was discharged by the Court of Queen's Bench, whose decision was affirmed in the Exchequer Chamber. The result of this was that the purchaser obtained as damages not only the whole amount of the profit on the resale, but his expenses of the original sale as well. These he would have had to pay out of his own pocket if the original sale had been duly completed. The result of the verdict, therefore, was to place him in a better position by reason of the breach of contract than he would have occupied if there had been no breach. Such a result, it is submitted, cannot possibly be supported. The true principle appears to have been applied in the case of *Day* v. *Singleton* (*t*). In that case the purchaser claiming damages as plaintiff was held by Romer, J., not to be entitled to damages for loss of his bargain, and was allowed to recover his deposit, with interest, and his costs of investigating the title. On appeal this judgment was reversed, except as regards *the deposit;* it was declared that the plaintiff was entitled to substantial damages for the vendor's breach of duty, and an inquiry was ordered to ascertain the amount of such damages according to the general principle of the Common Law. It seems, therefore, to have been recognised that, as the purchaser was to have substantial compensation for the loss of his bargain, he was not entitled, in addition, to recover expenses, which he would have had to bear himself if the contract had been completed (*u*). And in *Re Daniel* (*v*) it was expressly decided by Sargant, J., that a purchaser recovering substantial damages is not entitled

(*t*) 1899, 2 Ch. 320; stated above, p. 1028. The head-note states that the purchaser was held to be entitled to recover damages for loss of his bargain, *besides* his expenses; but it does not correctly represent the effect of the judgment.

(*u*) The right principle as to the damages recoverable appears to have been applied in *Hopkins* v. *Grazebrook*, 6 B. & C. 31, and *Robinson* v. *Harman*, 1 Ex. 850; though the decision in each of those cases, that substantial damages were in the circumstances recoverable at all, has been overruled; above, p. 1027, n. (*a*).

(*v*) 1917, 2 Ch. 405, 412; above, p. 1029.

to be recouped his expenses of investigating the title as well.

Damages for loss of profit, where land sold for a particular purpose.

Where land has been sold for a particular purpose, as for carrying on a trade or business there (*w*), and the vendor commits such a breach of contract as entitles the purchaser to damages for loss of his bargain, the purchaser's loss of profit from his inability to use the premises in the manner contemplated by the contract may be taken into consideration in assessing the damages recoverable from the vendor (*x*).

Purchaser has no lien for damages.

If the purchaser affirm the contract and claim damages for the vendor's breach, he has no lien on the land sold for the amount of damages recoverable, notwithstanding that this includes compensation for instalments of the purchase money actually paid (*y*).

A party may sue for specific performance or damages in the alternative.

It has been mentioned (*z*) that, on breach of an essential stipulation in the contract, the injured party electing to affirm the agreement has the alternative of suing at law for damages for the breach, or suing in equity for specific performance of the contract. Under the present practice, he can pursue these remedies in one action claiming alternative relief (*a*): but his recovery of judgment for damages will bar his right to enforce the contract specifically, as that is a conclusive election to adopt the legal remedy (*b*), and the other party's obligation under the

Judgment for either remedy bars the other.

(*w*) Above, p. 544.

(*x*) *Jaques* v. *Millar*, 6 Ch. D. 153; *Jones* v. *Gardiner*, 1902, 1 Ch. 191.

(*y*) *Cornwall* v. *Henson*, 1900, 2 Ch. 298, 305; above, p. 1030. Cf. above, p. 1014.

(*z*) Above, p. 1011.

(*a*) *Cornwall* v. *Henson*, 1900, 2 Ch. 298. Under the old Chancery practice such alternative relief could not have been obtained in equity; *Sainsbury* v. *Jones*, 5 My. & Cr. 1; and, of course, not at law. After Lord Cairns' Act, stat. 21 & 22 Vict. c. 27, it was possible to claim damages in equity as an addition to or in substitution for specific performance. Under the present practice a party suing in the alternative for specific performance or damages must take care to claim particularly such damages as he is entitled to recover at law for breach of the contract; otherwise his claim for damages may be treated as if it were merely made in substitution for the equitable remedy of specific performance, and may be defeated by anything which would bar his right to specific performance; see *Hipgrave* v. *Case*, 28 Ch. D. 356; *Nicholson* v. *Brown*, 1897, W. N. 52. As to alternative claims for specific performance or rescission, see *Farrant* v. *Olver*, 1922, W. N. 47, 127 L. T. 145, cited above, p. 1013, n. (*m*).

(*b*) *Orme* v. *Broughton*, 10 Bing. 533, 538; *Sainter* v. *Ferguson*, 1 Mac. & G. 286, 290.

contract is then merged in the judgment (*c*). And if he obtain an order for specific performance of the contract, that will be a bar to his recovering damages for the breach (*d*); for in equity the plaintiff suing on a breach of contract was required, as a rule, to elect which remedy he would pursue (*e*); and a man entitled to alternative remedies is barred, after judgment on the one, from asserting the other (*f*). If an action claiming damages for a breach of the contract be brought against a party thereto, he may counterclaim for specific performance; when, if the counterclaim be successful, the action will fail (*g*), and *vice versâ* (*h*), and the unsuccessful party will be estopped from again asserting a right to enforce the contract (*i*). And if such a counterclaim were not made, and judgment for damages were recovered, the defendant would equally lose all right to enforce the contract specifically; for the judgment would be conclusive against him that he had committed a breach of contract, so that he could then no longer maintain that he had always been ready and willing to carry out his part of the contract (*k*). This doctrine, however, applies only in the case of breach of an essential stipulation contained in the contract. If the stipulation broken were not essential, judgment for damages for a breach thereof would not preclude either party

(*c*) Above, p. 1006.

(*d*) *Dominion Coal Co., Ld.* v. *Dominion Iron, &c. Co., Ld.*, 1909, A. C. 293, 310, 311. In default of the defendant's compliance with the order, the plaintiff may rescind the contract, but cannot claim damages thereunder; *Henty* v. *Schröder*, 12 Ch. D. 666; above, p. 1012, n. (*m*). The passage in the text relates to common law damages, and not to those, which may in equity be given in addition to specific performance; see above, p. 1034, n. (*a*), and cases cited in n. (*x*); *Cooper* v. *Morgan*, 1909, 1 Ch. 261, where an order was made at a vendor's suit for specific performance and payment of the purchase money with interest *and* such damages (if any) as he had sustained by reason of the contract not having been specifically performed.

(*e*) *Carrick* v. *Young*, 4 Madd. 437; *Phelps* v. *Prothero*, 7 De G., M. & G. 722, 733, 734; *Gedye* v. *Montrose*, 26 Beav. 45, 47; Dan. Ch. Pr. 757, 4th ed.; 2 Dart, V. & P. 993, 5th ed.

(*f*) *Scarf* v. *Jardine*, 7 App. Cas. 345; *Morel* v. *Westmorland*, 1904, A. C. 11; and note (*b*), above.

(*g*) *Green* v. *Sevin*, 13 Ch. D. 589.

(*h*) *Compton* v. *Bagley*, 1892, 1 Ch. 313.

(*i*) Above, p. 1006.

(*k*) See *Walker* v. *Jeffreys*, 1 Hare, 341, 352; Fry, Sp. Perf. § 922, 3rd ed.; above, p. 1001. It appears that, under the old practice in equity, a judgment for damages at law for breach of a contract was in general a good plea in bar of a suit for specific performance of the contract; Mitford on Pleading, 253 (296, 5th ed.); Dan. Ch. Pr. 611-614, 4th ed.

from asserting afterwards the right to enforce the main duty of the contract either at law or in equity (*l*).

Effect of the dismissal of an action for specific performance.

If either party to the contract bring an action for its specific performance, and the action be dismissed upon any ground which furnishes a good defence to an action at law for breach of the contract, the unsuccessful plaintiff is estopped by the judgment from proceeding to recover damages for the breach (*m*), unless the judgment were expressly declared to be without prejudice to the plaintiff's remedy at law (*n*). If, however, the action for specific performance were dismissed upon any ground (such as hardship or unfair dealing (*o*)) which affords no defence to an action at law for breach of the contract, the unsuccessful party would not be precluded from afterwards pursuing his legal remedy, notwithstanding that his right to sue at law were not expressly reserved (*p*). In either case the *defendant* would not be precluded from suing on the contract at law (*q*), unless the defence, which he had established to the specific performance of the agreement, involved his own inability to enforce it, as if he had proved that the contract was void for his mistake (*r*) or for illegality (*s*).

Vendor's position at law after his action for specific per-

If the vendor's action for specific performance be dismissed because the Court considers that the title shown is too doubtful to be forced upon an unwilling purchaser (*t*), it appears that he

(*l*) Above, pp. 999, 1004, 1011.

(*m*) *Tredegar* v. *Windus*, L. R. 19 Eq. 607, 613-615.

(*n*) *Langmead* v. *Maple*, 18 C. B. N. S. 255. And note that, under the old practice in equity, where a vendor's suit for specific performance was dismissed on some ground, which would prevent his succeeding in an action on the contract at law, as his failure to show a good title, the Court would order the return of the deposit with interest, unless the order were intended to be made without prejudice to the vendor's remedy at law; *Anson* v. *Hodges*, 5 Sim. 227; *Southcomb* v. *Exeter*, 6 Hare, 213, 225-228; *Webb* v. *Kirby*, 7 De G., M. & G. 376; *Rede* v. *Oakes*, 2 De G., J. & S. 518; Sug. V. & P. 641.

(*o*) Above, pp. 37, 758, 764, 765.

(*p*) *Beere* v. *Fleming*, 13 Ir. Com. Law Rep. 506, 513; *Tredegar* v. *Windus*, L. R. 19 Eq. 607, 614; and consider *Mortlock* v. *Buller*, 10 Ves. 292, 318; *Thomas* v. *Dering*, 1 Keen, 729; *Wedgwood* v. *Adams*, 8 Beav. 103, 105; *Collins* v. *Cave*, 4 Jur. N. S. 31; *Malden* v. *Fyson*, 11 Q. B. 292; *Webster* v. *Cecil*, 30 Beav. 62, 64; above, pp. 83, 189-192, 758, 778.

(*q*) *Hodges* v. *Litchfield*, 1 Bing. N. C. 492; above, pp. 1012, 1013; *Simmons* v. *Heseltine*, 5 C. B. N. S. 554.

(*r*) Above, pp. 739 *sq.*

(*s*) Above, p. 838.

(*t*) Above, pp. 123, 183, 192, 472; and see next section.

is not estopped from asserting his remedy at law (*u*). And *at law* the vendor is entitled to recover substantial damages (*x*) from the purchaser if the latter refuse to accept such a title to the land as he had contracted to take, notwithstanding that a Court of Equity, in proceedings for specific performance against the purchaser, would not oblige him to take the title shown, or that to accept the title would expose him to the risk of instant ejectment (*y*). The question is thus raised, What title does the vendor contract to show according to the construction to be placed on the agreement in a Court of law? As we have seen (*z*), where the parties enter into special stipulations restrictive of the purchaser's right to investigate the title, these are rigidly enforced at law; and unless the vendor has made a misrepresentation sufficient to justify the *rescission* of the contract (*a*), the purchaser is liable in damages for a breach of the agreement, regardless of the fact that in equity the contract is not specifically enforceable or the stipulation is thought to be unfair. With respect to the title contracted to be shown under an open contract, conflicting opinions have been judicially expressed. It has been asserted, on the one hand, that the vendor contracts to show a good marketable title (*b*); and this would oblige him to show such a title as a Court of Equity would force an unwilling purchaser to accept (*c*). But against this it has been decided that, according to the true construction of the contract in a Court of law, the vendor is only obliged to prove such a title as a Court of law shall consider to be good; and that, where the title depends on a doubtful point of law, the Court will decide the question and pronounce definitely whether the title is such as should be accepted or not, without regard to the doctrine of

formance has been dismissed because the title is doubtful.

Vendor may recover damages if the purchaser refuse such a title as he contracted to take.

Is the vendor bound at law to show a good *marketable* title?

(*u*) See *Cooper* v. *Denne*, 1 Ves. jun. 565, 566; and consider the cases cited above, p. 1036, n. (*p*), and below, notes (*y*), (*e*), p. 1038. Where a vendor, whose action for specific performance has been dismissed on the above ground, is entitled to retain a deposit paid to him for the reason that the purchaser has committed a breach of contract in not accepting the title, he must be equally entitled, as an alternative, to sue for damages for the breach; see note (*y*).

(*x*) Above, p. 1023.

(*y*) *Best* v. *Hamand*, 12 Ch. D. 1, 12; and consider *Re Scott and Alvarez's Contract*, 1895, 2 Ch. 603; above, pp. 189-192; and consider *Rosenberg* v. *Cook*, 8 Q. B. D. 162; above, p. 168.

(*z*) Above, pp. 37, 69, 83, 189-192, and note (*y*), above.

(*a*) See above, p. 808.

(*b*) *Jeakes* v. *White*, 6 Ex. 873, 881; diss. Martin, B. Note that this opinion was a *dictum* only, not necessary for the decision in the case.

(*c*) Above, p. 477.

equity concerning doubtful titles (*d*). The weight of authority is in favour of the latter conclusion (*e*). But where the vendor is claiming damages under the contract, the *onus* lies on him of proving his title (*f*); and, as we have seen (*g*), if his title depend on proof of a fact, the purchaser is not bound at law to accept it, unless the vendor can prove the fact to be reasonably certain. If a vendor should have expressly contracted to show a good *marketable* title, it is thought that he could not recover damages for the purchaser's refusal to accept the title in case it were too doubtful for a Court of Equity to force upon an unwilling purchaser (*h*).

Defences to an action for damages for breach of the contract.

Here it may be useful to give a brief analysis of the defences which may be made to an action for damages for breach of a contract to sell land. It should be premised that the *onus* lies on the plaintiff of proving the formation of the contract (*i*), his own fulfilment of any condition precedent to the defendant's liability (*k*), and the defendant's breach of the agreement (*l*). The defendant may set up as a defence (1) a denial of the formation of the contract, or (2) a denial of its enforceability, or (3) a denial of its validity, or (4) an assertion of his discharge from the obligation of the contract, or (5) a denial of the plaintiff's performance of all conditions precedent to the defendant's liability, or (6) a denial of the alleged breach. Denial of the formation of the contract is illustrated where the plaintiff asserts and the defendant denies that some letters which have passed between them amount to a binding agreement of sale (*m*); or where the defendant denies that some third person, with whom

1. Denial of the formation of the contract.

(*d*) *Boyman* v. *Gutch*, 7 Bing. 379. But it should be noted that, as a vendor is bound to show a good title in equity as well as at law (above, pp. 150, 158), it was considered, after some conflict of opinion, that an equitable incumbrance might form a good ground of objection to a title in a Court of law, even before the Judicature Acts or the Common Law Procedure Act, 1854; Sug. V. & P. 400, 401; *Stevens* v. *Austen*, 3 E. & E. 685.

(*e*) See *Simmons* v. *Heseltine*, 5 C. B. N. S. 554, 569, pointing out that *Boyman* v. *Gutch* was not cited in *Jeakes* v. *White; Stevens* v. *Austen*, 3 E. & E. 685, 700; cases cited above, pp. 189-192; Sug. V. & P. 400; 2 Dart, V. & P. 976, 5th ed.

(*f*) Above, p. 1001.

(*g*) Above, p. 142, and n. (*e*).

(*h*) See above, p. 477.

(*i*) Above, pp. 1 *sq.*

(*k*) Above, pp. 999-1001.

(*l*) Above, pp. 998-1000.

(*m*) Above, pp. 6-20.

the plaintiff has contracted or who has signed the memorandum of contract, was his agent having his authority to bind him (*n*). The defence that the alleged contract is not enforceable is raised by a plea of the Statute of Frauds (*o*), or of any Statute of Limitation (*p*). If the defendant must admit the formation, or apparent formation (*q*), of the contract, and cannot take the above-mentioned objections to its enforceability, he may attack the validity of the contract, and may maintain either that it is void *ab initio* or that it is voidable at his option and he has elected to avoid it. The contention that the contract is altogether void is illustrated where the defendant says that, owing to a mistake which he is not estopped from asserting, there was no true consent, and, therefore, no real agreement, between the plaintiff and himself (*r*); also where it is asserted that there has been a mistake, common to both parties, as to some fact, which is a condition precedent to their agreement (*s*); and where it is pleaded that the contract is void for illegality (*t*). The defence that the agreement was voidable at the defendant's option, and that he chooses to avoid it, occurs where he resists the enforcement of the contract on the ground of misrepresentation, whether fraudulent or innocent, duress, or undue influence (*u*); in most cases where he pleads some legal incapacity (*x*); and where he sets up some relative equitable disability in bar of the plaintiff's claim (*y*). The plea of discharge from the obligation of the contract has been considered in the preceding chapter (*z*). The objection, that the plaintiff has not fulfilled some condition precedent to the defendant's liability, is illustrated where the vendor sues for non-acceptance of the title and the defendant denies that a good title has been shown (*a*); or where the purchaser sues for refusal to convey and the vendor denies that the plaintiff was ready to pay the price (*b*); also where the contract was made subject to some condition precedent, which has not been performed (*c*). A denial of the alleged breach occurs where the defendant admits

2. Denial of its enforceability.

3. Denial of its validity.

Mistake avoiding the contract.

4. Discharge from the contract.

5. Denial of plaintiff's performance of some condition precedent.

6. Denial of the breach.

(*n*) Above, pp. 10, 21, and n. (*y*), 22, and n. (*d*), 746, and n. (*t*); below, pp. 1041 *sq.*
(*o*) Stat. 29 Car. II. c. 3, s. 4; above, pp. 3, 11.
(*p*) Above, pp. 1007-1009.
(*q*) Above, pp. 739 *sq.*
(*r*) Above, pp. 740-753.
(*s*) Above, p. 766.
(*t*) Above, pp. 832 *sq.*
(*u*) Above, pp. 789 *sq.*
(*x*) Above, pp. 845 *sq.*
(*y*) Above, pp. 947 *sq.*
(*z*) Above, pp. 975 *sq.*
(*a*) Above, pp. 1000-1002.
(*b*) Above, pp. 793, 1001, 1002.
(*c*) Above, p. 980.

the contract and does not charge the plaintiff with any default in its performance, but disputes the facts alleged to constitute his own breach of the agreement. Under the present practice any defences which may be taken to an action may be raised in the alternative, notwithstanding that one ground of defence may be inconsistent with another (*d*).

Vendor's position after judgment for or against him.

When judgment has been obtained by or against the vendor for damages for breach of one of the main duties (*e*) arising under the contract, his obligation to convey the land sold to the purchaser is merged and extinguished in the judgment (*f*). He is therefore restored to his former position of full owner of the land, and may thenceforth freely deal with it as his own. And it is thought that, on any subsequent sale of the land, a purchaser having notice of the prior contract (*g*) may safely accept the title, if otherwise good, on receiving proof of the judgment (*h*). But the vendor suing or sued for damages for breach of his contract to sell land cannot safely make any disposition thereof contrary to the agreement until judgment has been recovered, for until then the purchaser is not estopped from suing for the specific performance of the contract (*i*). But we have seen (*k*) that the vendor may lawfully exercise his powers of disposition where the purchaser has committed such a breach of the contract as unquestionably discharges him from his obligation thereunder, and he elects to *rescind* and not to affirm the contract.

Position of the parties where one signed the memorandum as agent.

In connection with the liability of the parties to a contract for the sale of land to be sued at law for breach of the agreement, it will be convenient to explain the position of the persons interested where one of the signatories to the memorandum of contract professes or is alleged to have signed as agent for a

(*d*) *Berdan* v. *Greenwood*, 3 Ex. D. 251, 255; *Hawkesley* v. *Bradshaw*, 5 Q. B. D. 302; *Emden* v. *Carte*, 19 Ch. D. 311, 317; *Re Morgan*, 35 Ch. D. 492, 499, 500. As to the manner of raising defences under the present practice, see R. S. C. 1883, Orders XVIIIA. rr. 3, 5, XIX., XXI., XXVIII., XXX., and notes thereto in the Annual Practice.

(*e*) See above, pp. 35, 1001, 1011, 1036.

(*f*) Above, p. 1006.

(*g*) Above, pp. 534, 535, 1021, 1022.

(*h*) Above, pp. 136, 137.

(*i*) Consider *Hipgrave* v. *Case*, 28 Ch. D. 358; *Cornwall* v. *Henson*, 1900, 2 Ch. 298; above, pp. 1034 *sq.*

(*k*) Above, pp. 1019-1022.

named or for an undisclosed principal (*l*). As a general rule, only the persons named in an agreement as the contracting parties or their representatives in law or their assigns can sue thereon; and the parties alone, or their legal representatives, can be sued thereon at law (*m*). But an exception occurs in the case of principals, who may sue or be sued on contracts made by their agents, with their authority, notwithstanding that they were not named as parties to the agreement (*n*). A contract entered into for the sale of land by one who afterwards professes or is alleged to have been acting as agent for some particular principal may have been made in any of the following states of fact:—(1) The agency may have been disclosed and the principal named in the memorandum. (2) The agency may have been disclosed in the memorandum, but the principal may not have been named therein. (3) Neither the agency nor the name of the principal may have been disclosed in the memorandum, the agent contracting ostensibly on his own account.

Where one contracts with another professedly acting as agent for a particular principal, the liability of the principal and agent is determined by the parties' intention.

Now in all cases where, at the time of entering into a contract, one contractor is made aware that the other party is contracting with him as agent for a third person named as principal, and the principal has authorised or ratifies the agent's act, the principal is just as much a party to the agreement as if he had contracted in person; and (subject to the effect of the rules of evidence where the contract is put into writing) it is a question of the intention of the parties to be gathered from the terms of the contract and the circumstances of the case, what liabilities the principal and his agent are to incur to the opposite party (*o*). Thus, the parties may by their agreement determine that either the principal or the agent shall be exclusively liable, or that they shall both be liable either severally or jointly, or jointly

(*l*) See above, pp. 3, 10.

(*m*) Above, pp. 502 *sq.*, 513, 514, 516, 528, 538; Wms. Pers. Prop. 198, 17th ed.; *Barker* v. *Stickney*, 1918, 2 K. B. 356, affd. 1919, 1 K. B. 121. As to the extent of the right of persons, who are not parties to a contract, but are named therein as intended to take the benefit thereof, to take proceedings in equity to oblige the party entitled at law to sue on the contract to enforce it against the party bound, see below, p. 1042, and note (*v*).

(*n*) *Thomson* v. *Davenport*, 9 B. & C. 78; 2 Smith, L. C. 355, 12th ed.

(*o*) *Thomson* v. *Davenport*, 9 B. & C. 78; *Calder* v. *Dobell*, L. R. 6 C. P. 486; and see *H. O. Brandt & Co.* v. *H. N. Morris & Co., Ld.*, 1917, 2 K. B. 784.

and severally, and that their liability shall be alternative or cumulative. And the rights of the principal and the agent to enforce the contract are in general correlative to their respective liabilities (*p*). Subject to the principle that the rights and liabilities of any parties to a contract are determined by their intention expressed or to be implied therein, and in the absence of any indication of a contrary intention, the rights and obligations of the persons interested will be ascertained by the following general rules:—

Where the principal is named in the memorandum.

In case (1), where in the memorandum the principal is named and the agent purports to contract on his behalf, the principal, if he previously authorised or subsequently ratified (*q*) the agent's act, has the right to enforce and is liable to perform the agreement, to the exclusion of the agent, who, as a rule, acquires no rights against (*r*) and incurs no liability to the other party to the memorandum (*s*). If, however, the contract were made by deed, then, according to the common law rule that the parties only to an indenture can sue or be sued thereon, the agent alone is liable and he can sue upon the agreement (*t*). But it appears that under the present law the principal being named in, though not made a party to, the deed might enforce the agreement in so far as it were a covenant respecting any tenements or hereditaments (*u*); or he might enforce the contract under the equitable jurisdiction of the Court, if the provisions of the deed were such as to constitute him a *cestui-que-trust* of the benefit of the agreement (*v*). Again, the established usage

Contract made by deed.

(*p*) *Calder* v. *Dobell*, L. R. 6 C. P. 486, 493, 494; *Elbinger Actien-Gesellschaft* v. *Claye*, L. R. 8 Q. B. 313, 317.

(*q*) *Bolton Partners* v. *Lambert*, 41 Ch. D. 295 (on which case see the note in Fry, Sp. Perf. 711, 3rd ed.); *Re Portuguese Copper Mines, Ld.*, 45 Ch. D. 16; *Re Tiedemann and Ledermann*, 1899, 2 Q. B. 66; *Keen* v. *Mear*, 1920, 2 Ch. 574, 579, 580.

(*r*) *Bickerton* v. *Burrell*, 5 M. & S. 383; *Rayner* v. *Grote*, 15 M. & W. 359, 365. But an agent, if he signs in his own name, may be entitled to sue on the contract, notwithstanding that the contract purports to be made on behalf of a named principal; *H. O. Brandt & Co.* v. *H. N. Morris & Co.*, 1917, 2 K. B. 784.

(*s*) Consider *Downman* v. *Williams*, 7 Q. B. 103, 111; *Lewis* v. *Nicholson*, 18 Q. B. 503; *Fairlie* v. *Fenton*, L. R. 5 Ex. 169; *Gadd* v. *Houghton*, 1 Ex. D. 357; *H. O. Brandt & Co.* v. *H. N. Morris & Co.*, 1917, 2 K. B. 784.

(*t*) *Appleton* v. *Binks*, 5 East, 148; *Southampton* v. *Brown*, 6 B. & C. 718; *Beckham* v. *Drake*, 9 M. & W. 79, 85, 11 M. & W. 315, 317.

(*u*) Stat. 8 & 9 Vict. c. 106, s. 5, applying to deeds executed after the 1st Oct. 1845; *Dyson* v. *Forster*, 1909, A. C. 98.

(*v*) *Hook* v. *Kinnear*, 3 Swanst. 417, n.; *Gregory* v. *Williams*, 3 Mer.

of merchants is that, in the absence of stipulation to the contrary, an agent acting for a foreign principal has no authority to pledge his principal's credit; and on contracts affected by this usage the agent is alone liable or entitled to sue (*x*), in the absence of stipulation to the contrary (*y*), or unless a contrary intention appear from the contract (*z*). And where at the time of entering into the agreement the principal was not in existence or had not the legal capacity to make the contract, the agent is liable thereon (*a*). An example of this last doctrine occurs in the case of contracts purporting to be made by an agent on behalf of a company not yet formed. Here the agent is liable upon the contract (*a*), and the company cannot afterwards ratify the agent's act, as such; though it may, of course, enter into a new agreement with the other contracting party to the same effect (*b*). If an agent contract on behalf of a principal named

Foreign principal.

Where the principal was not in existence, or was incapable of contracting.

Contracts by company promoters.

582, 590; *Touche* v. *Metropolitan, &c. Co.*, L. R. 6 Ch. 671; *Re Empress Engineering Co.*, 16 Ch. D. 125, 129; *Lloyd's* v. *Harper*, 16 Ch. D. 290; *Re Flavell*, 25 Ch. D. 89; see *Gandy* v. *Gandy*, 30 Ch. D. 57; *Re Dunderland Iron Ore Co., Ld.*, 1909, 1 Ch. 446; *Les Affréteurs Réunis Société Anonyme* v. *Leopold Walford (London), Ld.*, 1919, A. C. 801; *Hohler* v. *Aston*, 1920, 2 Ch. 420. Where persons who are not parties to a contract are named therein as objects whom it is intended to benefit, but no trust is constituted in their favour nor is there any consideration as regards them—where, for instance, in a marriage contract they are not within the marriage consideration—they are not entitled to enforce the contract; *Colyear* v. *Mulgrave*, 2 Keen, 81; *Re D'Angibau*, 15 Ch. D. 228, 242, 246; *Re Plumptre's Marriage Settlement*, 1910, 1 Ch. 609, 618; *Re Pryce*, 1917, 1 Ch. 234, 241.

(*x*) *Armstrong* v. *Stokes*, L. R. 7 Q. B. 594, 605; *Elbinger Actien-Gesellschaft* v. *Claye*, L. R. 8 Q. B. 313; *Hutton* v. *Bulloch*, ib. 331, affirmed, L. R. 9 Q. B. 572; *H. O. Brandt & Co.* v. *H. N. Morris & Co.*, 1917, 2 K. B. 784, 794, 797.

(*y*) *Gadd* v. *Houghton*, 1 Ex. D. 357.

(*z*) *Miller, Gibb & Co.* v. *Smith & Tyrer, Ld.*, 1917, 2 K. B. 141; cf. *H. O. Brandt & Co.* v. *H. N. Morris & Co.*, ubi sup.

(*a*) *Kelner* v. *Baxter*, L. R. 2 C. P. 174; *Scott* v. *Ebury*, ib. 255, 267.

(*b*) *Kelner* v. *Baxter*, ubi sup.; *Re Empress Engineering Co.*, 16 Ch. D. 125; *Re Northumberland Avenue Hotel Co.*, 33 Ch. D. 16; *Bagot, &c. Co.* v. *Clipper, &c. Co.*, 1902, 1 Ch. 146; *Natal Land, &c. Co.* v. *Pauline Colliery Syndicate*, 1904, A. C. 120, 126; see also *Re English and Colonial Produce Co.*, 1906, 2 Ch. 435; *Re National Motor, &c. Co., Ld.*, 1908, 2 Ch. 515. By the Railway Construction Facilities Act, 1864 (stat. 27 & 28 Vict. c. 121), s. 30, in the case of companies incorporated by certificate under that Act, contracts relative to the purchase or taking of lands for the railway, and entered into by the promoters before the incorporation of the company by the certificate, shall be as binding on the company as if they had been entered into by the company. Upon the question whether in any other case a contract made by a promoter before the company's incor-

Where the agent contracts without the principal's authority.

in the memorandum when he has no authority to make the contract, and the principal decline to ratify it, then neither the principal nor the agent (*c*) is liable upon or can enforce the contract; but the other party can sue the agent upon an implied warranty of his authority to make the contract (*d*), or if the agent *fraudulently* misrepresented that he had such authority, in an action of deceit (*e*).

Where the agency is disclosed, but not the principal's name.

In case (2), where in the memorandum the agent professes to contract as an agent for some person interested as principal, but without disclosing the principal's name, the general rule is that the principal, if he had authorised the contract, may declare himself and enforce the contract; he may also be sued on the contract by the other party, if the other can prove that he authorised the agreement (*f*). But in the case of contracts required by the fourth section of the Staute of Frauds to be put into writing (*g*), if they are made by an agent signing on behalf of some principal in such terms that the agent is not personally liable, the principal cannot sue or be sued on the contract unless he be therein actually named or sufficiently described so as to identify him; for the law requires that in these cases the parties to the contract must be ascertained from the written memorandum (*h*). If when the contract was made the agent was assuming to act, though without authority, for some principal then in existence and capable of being ascer-

poration can be specifically enforced against the company, see *Shrewsbury* v. *North Staffordshire Ry. Co.*, L. R. 1 Eq. 593, 613 *sq.;* Fry, Sp. Perf. §§ 247-255, 3rd ed.

(*c*) *Lewis* v. *Nicholson*, 18 Q. B. 503.

(*d*) *Collen* v. *Wright*, 8 E. & B. 647; *Firbank's Executors* v. *Humphreys*, 18 Q. B. D. 54, 62; *Starkey* v. *Bank of England*, 1903, A. C. 114; above, p. 819. But the agent is not liable on a warranty of authority where the other party was aware that the agent had no authority to bind the principal, and accepted the agreement for what it was worth subject to the chance of the principal being induced to ratify it; *Halbot* v. *Lens*, 1901, 1 Ch. 344. As to the measure of damages, where the agent is so liable, see *Godwin* v. *Francis*, L. R. 5 C. P. 295; *Re National Coffee Palace Co.*, 24 Ch. D. 367.

(*e*) *Polhill* v. *Walter*, 3 B. & Ad. 114; *Randell* v. *Trimen*, 18 C. B. 786; see above, pp. 805, 806.

(*f*) *Thomson* v. *Davenport*, 9 B. & C. 78; see also *Morris* v. *Wilson*, 5 Jur. N. S. 168; Jessel, M. R., *Commins* v. *Scott*, L. R. 18 Eq. 11, 16; *Filby* v. *Hounsell*, 1896, 2 Ch. 737, 740, 741.

(*g*) Above, p. 3.

(*h*) *Potter* v. *Duffield*, L. R. 18 Eq. 4; *Jarrett* v. *Hunter*, 34 Ch. D. 182; *Lovesy* v. *Palmer*, 1916, 2 Ch. 233, 239, 240, 242, 244, criticising the decision in *Filby* v. *Hounsell*, 1896, 2 Ch. 737, 740, 741; *Keen* v. *Mear*, 1920, 2 Ch. 574, 581; above, p. 5.

tained, such principal may afterwards ratify the contract and sue or be sued thereon. It is thought, however, that if the agent in making the contract had no principal for whom he assumed to act, but entered into the agreement in the hope that he might afterwards find some person willing to adopt it, the agent's act cannot afterwards be ratified by any person as principal (*i*). The agent's rights and liabilities in the case which we are considering depend on the intention of the parties as expressed in the memorandum of contract (*j*). And it appears that if the terms of the memorandum import no more than a statement of the fact, that the agent is the agent of some person not named, he is *primâ facie* liable upon and can enforce the agreement; for it will not be presumed that the other contractor gave credit to the unknown principal exclusively in exoneration of the known agent (*k*). And if on the face of the memorandum the agent be liable, he is not at liberty to prove by parol evidence that the other contractor was aware of the principal's name and gave credit to the principal in exoneration of the agent (*l*). But if the true construction of the memorandum be that the agent contracts only on behalf of the undisclosed principal and not on his own account, he can neither sue nor be sued on the agreement (*m*); unless in truth he were acting on his own account and were himself the principal in making the contract. In this event he is at liberty to repudiate his character of agent and adopt the agreement as his own (*n*); and he may be sued thereon by the other party, if the other can prove that he was the real principal (*o*). If the contract purport to be made on behalf of some undisclosed

The agent's position.

(*i*) Consider *Hagedorn* v. *Oliverson*, 2 M. & S. 485; *Foster* v. *Bates*, 12 M. & W. 226; *Watson* v. *Swann*, 11 C. B. N. S. 756; *Lyell* v. *Kennedy*, 14 App. Cas. 437, 456; *Keighley* v. *Durant*, 1901, A. C. 240, 251, 254, 255; *Boston Fruit Co.* v. *British, &c. Insce. Co.*, 1905, 1 K. B. 637.

(*j*) Above, p. 1041.

(*k*) *Lennard* v. *Robinson*, 5 E. & B. 125; *Hough* v. *Manzanos*, 4 Ex. D. 104, 106; Bowen, J., *Irvine* v. *Watson*, 5 Q. B. D. 102, 107; *Hutcheson* v. *Eaton*, 13 Q. B. D. 861, 865, 868.

(*l*) *Higgins* v. *Senior*, 8 M. & W. 834; Willes, J., *Calder* v. *Dobell*, L. R. 6 C. P. 486, 493, 495; see above, p. 769.

(*m*) *Southwell* v. *Bowditch*, 1 C. P. D. 374; *Gadd* v. *Houghton*, 1 Ex. D. 357; *Miller, Gibb & Co.* v. *Smith & Tyrer, Ld.*, 1917, 2 K. B. 141; *Ariadne S.S. Co.* v. *James McKelvie & Co.*, 1922, 1 K. B. 518.

(*n*) *Schmaltz* v. *Avery*, 16 Q. B. 655; *Harper & Co.* v. *Vigers*, 1909, 2 K. B. 549.

(*o*) *Carr* v. *Jackson*, 7 Ex. 382.

principal, so as to exclude the agent's liability thereon, and in making the contract the agent were acting without the authority of the person for whom he assumed to act, or without any principal at all, and were not himself the real principal, it appears that he would be liable to the other contractor under the doctrine of implied warranty of authority; for he professed to contract on behalf of some particular principal, although he did not name him (*p*). And if in such case the agent both falsely and *fraudulently* represented that he had the authority of some person unnamed to make the contract, he would be liable in an action of deceit (*q*).

Where the memorandum neither discloses any principal's name nor the fact of agency.

In case (3), where a person, who afterwards professes or is alleged to be an agent, ostensibly contracted on his own account, and the memorandum contains no reference to any other person as principal or to the fact of the contractor's agency, he is liable upon and can enforce the contract; and he is not at liberty to prove by parol evidence, so as to avoid his liability on the contract, that he was in truth acting as agent for some principal, and that it was agreed that the principal, and not the agent, should undertake the burthen of the contract (*r*). Nor can the other contractor put in such parol evidence to bar the agent's right to sue upon the contract (*s*). But if the one contractor did in fact make the contract as agent for some principal who had authorised him to make it, the principal may, as a rule, sue (*t*) or be sued (*u*) on the contract, and the facts necessary to establish his right or liability may be proved by parol evidence. For such evidence does not contradict or alter the written agreement, but merely adds something to it (*v*).

(*p*) See cases cited above, p. 1044, n. (*d*); and *Cherry* v. *Colonial Bank of Australasia*, L. R. 3 P. C. 24, 31.

(*q*) Above, p. 1044.

(*r*) Above, p. 1045, n. (*l*).

(*s*) *Higgins* v. *Senior*, 8 M. & W. 834, 844.

(*t*) *Bateman* v. *Phillips*, 15 East, 272; *Garrett* v. *Handley*, 4 B. & C. 664; *Fred. Drughorn, Ld.* v. *Rederiaktiebolaget Transatlantic*, 1919, A. C. 203; and see *Daniels* v. *Trefusis*, 1914, 1 Ch. 788.

(*u*) *Paterson* v. *Gandasequi*, 15 East, 62; *Re Baker & Selmon's Contract*, 1907, 1 Ch. 238, 243. But in an action between the ostensible parties to a contract, one party cannot interrogate the other for the purpose of discovering if the other was acting as agent for an undisclosed principal; *Sebright* v. *Hanbury*, 1916, 2 Ch. 245.

(*v*) *Higgins* v. *Senior*, 8 M. & W. 834, 844; *Beckham* v. *Drake*, 9 M. & W. 79, 11 ib. 315, 317; *Calder* v. *Dobell*, L. R. 6 C. P. 486; *Morris* v. *Wilson*, 5 Jur. N. S. 168; *Filby* v. *Hounsell*, 1896, 2 Ch. 737, 740, 741; see above, p. 769, n. (*g*); cf. above, p. 1044.

If, however, the terms of the contract were inconsistent with the existence of any undisclosed principal, as where an agent employed to sell land contracts in words, which represent him to be the owner of it, the principal can have no right or liability under the agreement (*x*). And if the principal by words or conduct represented to the other contractor that the agent was contracting or was in a position to contract as principal, he is estopped from alleging that the agreement was made by the agent on his behalf (*y*). Where the contract was made under seal, the principal cannot be sued thereon; nor can he sue to enforce it (*z*), except as *cestui-que-trust* in the agent's name (*a*). If the undisclosed principal claim to enforce the contract, he can only do so subject to all equities existing between the agent and the other contractor (*b*); he is therefore liable, if he sue upon the contract, to be met with any defence (such as a set-off) which would have been available in an action brought by the agent (*c*). It has been held; however, that this right of the other contractor, to be placed in the same position as if he were being sued by the agent, depends on his having been induced to believe that the agent was acting on his own account; and if he did not enter into the agreement in the positive belief that the agent was contracting as principal, he cannot set up as a defence to an action, brought by the principal on the contract, any set-off or other claim available against the agent alone (*d*). Where a contract is made by an agent on behalf and by the authority of an undisclosed principal, and the agent as well as the principal is liable on the contract (*e*), their liability is,

Contract inconsistent with the existence of an undisclosed principal.

Representation by the principal that the agent is a principal.

Contract made by deed.

Principal subject to equities existing between the agent and the other contractor.

Alternative liability of principal or agent.

(*x*) *Humble* v. *Hunter*, 12 Q. B. 310; *Formby Bros.* v. *Formby*, 102 L. T. 116; *Rederiaktiebolaget Argonaut* v. *Hani*, 1918, 2 K. B. 247; cf. *Fred. Drughorn, Ld.* v. *Rederiaktiebolaget Transatlantic*, 1919, A. C. 203, 208, 209, 210.

(*y*) *Ferrand* v. *Bischoffsheim*, 4 C. B. N. S. 710, 717; *Ramazotti* v. *Bowring*, 7 C. B. N. S. 851.

(*z*) Above, p. 1042.

(*a*) See *Mollett* v. *Robinson*, L. R. 7 C. P. 84, 119; *Armstrong* v. *Stokes*, L. R. 7 Q. B. 598, 605; above, p. 1042.

(*b*) Parke, B., *Beckham* v. *Drake*, 9 M. & W. 79, 98.

(*c*) *George* v. *Clagett*, 7 T. R. 359; *Sims* v. *Bond*, 5 B. & Ad. 389, 393; *Isberg* v. *Bowden*, 8 Ex. 852, 859; Willes, J., *Dresser* v. *Norwood*, 14 C. B. N. S. 574, 589; *Expte. Dixon*, 4 Ch. D. 133; *Montagu* v. *Forwood*, 1893, 2 Q. B. 350.

(*d*) *Cooke* v. *Eshelby*, 12 App. Cas. 271. But if the other contractor did enter into the agreement in this belief, he will not be deprived of this right by the mere fact that he had the means of knowing that the agent was acting for some principal; *Borries* v. *Imperial Ottoman Bank*, L. R. 9 C. P. 38.

(*e*) Above, pp. 1041, 1046.

as a rule, alternative (*f*); and it is in the election of the other contractor, after discovering the principal, to sue either the principal or the agent in respect of the agreement. But election to charge the principal on the contract must be made within a reasonable time after his discovery (*g*). This election once made is irrevocable (*h*), but it is not in general finally signified until the one or the other of them has been sued to judgment (*i*). If, however, the other contractor have by words or conduct induced the principal to believe that he has given credit to the agent exclusively for the performance of the contract, and the principal have acted on this belief by settling with the agent in respect thereof, or otherwise altering his position, the other contractor is estopped from suing the principal on the agreement (*k*). And if the other contractor sue the principal on the contract, the principal cannot plead in defence that he put the agent in funds or otherwise provided him with the means of performing the contract, unless the other contractor had by words or conduct induced the principal to believe that he had settled with the agent in respect of the agreement (*l*).

Where one contracts ostensibly on his own account and without authority to contract on behalf of some principal, the act cannot be ratified by any person as principal.

Where a man has contracted ostensibly on his own account, not assuming to act as agent for any principal, and had no authority from any principal to make the contract, another person cannot afterwards ratify the agreement as principal, so as to become entitled to enforce or liable to perform it; and the alleged agent alone can sue or be sued thereon (*m*).

Contractor seeking to charge principal must prove that he

In every case in which a contractor seeks to enforce an agreement, made with him by an agent, against the agent's principal, whether named in or upon making the contract or not, the *onus* lies on him of proving that the principal authorised or ratified the agent's act (*n*). And the principal is not liable upon any

(*f*) See above, pp. 1041, 1042.

(*g*) *Smethurst* v. *Mitchell*, 1 E. & E. 622.

(*h*) Cf. above, pp. 810, 966.

(*i*) *Priestly* v. *Fernie*, 3 H. & C. 977; *Calder* v. *Dobell*, L. R. 6 C. P. 486, 499; *Curtis* v. *Williamson*, L. R. 10 Q. B. 57; *Morel* v. *Westmorland*, 1904, A. C. 11; above, pp. 1006, 1034, 1035.

(*k*) *Wyatt* v. *Hertford*, 3 East, 147; *Horsfall* v. *Fauntleroy*, 10 B. & C. 755; above, p. 1047, n. (*y*).

(*l*) *Heald* v. *Kenworthy*, 10 Ex. 739, 745; *Irvine* v. *Watson*, 5 Q. B. D. 414; *Davison* v. *Donaldson*, 9 Q. B. D. 623.

(*m*) *Keighley* v. *Durant*, 1901, A. C. 240.

(*n*) Above, pp. 1041, 1044; *Godwin* v. *Brind*, L. R. 5 C. P. 299 n.; *Hamer* v. *Sharp*, L. R. 10 Eq. 108; *Rosenbaum* v. *Belson*, 1900, 2 Ch.

contract made by his agent without his authority (*o*), unless he choose to ratify the agent's act, if it be capable of ratification (*p*), or represented to the other contractor that the agent was authorised to act on his behalf (*q*). On the latter ground, where an agent is invested by his principal with an apparent or ostensible authority, the principal is bound by the agent's acts done within the scope of that authority, notwithstanding that he may have secretly limited (*r*) or revoked it (*s*). On this principle also, where an agent's authority is revoked by law, as in case of the principal's bankruptcy (*t*) or insanity (*u*), the principal or his estate is liable on contracts subsequently made by the agent with a contractor, who had no notice of the revocation of the authority. But this rule has not been applied in the case of revocation by the principal's death (*x*). Where an agent contracts on behalf of his principal, and the contract is within the terms of a written authority given to him, the principal is liable on the agreement, notwithstanding that in making the contract the agent was really acting for his own advantage and not in furtherance of his principal's interest; and this is equally the case, although the other contractor did not inquire as to or ask for the production of the agent's authority (*y*).

authorised or ratified the agent's act.

Agent contracting within his authority but in his own advantage.

Here it may be noted that if an owner of land instruct an estate agent to place it on his books and to find a purchaser for

Authority of an estate agent to make

267, 268; *Hambro* v. *Burnand*, 1903, 2 K. B. 399, reversed 1904, 2 K. B. 10; *Thuman* v. *Best*, 1907, W. N. 170, 97 L. T. 239; *Keen* v. *Mear*, 1920, 2 Ch. 574, 580, 581.

(*o*) Above, pp. 1044, 1045, 1048, and previous note; *Chinnock* v. *Marchioness of Ely*, 4 De G., J. & S. 638.

(*p*) Above, pp. 1041, 1045, 1048.

(*q*) *M'Iver* v. *Humble*, 16 East, 169, 174; and see Wms. Pers. Prop. 468, 17th ed.; and cases cited in the two next notes.

(*r*) *Maddick* v. *Marshall*, 16 C. B. N. S. 387, 17 C. B. N. S. 829; *Edmunds* v. *Bushell*, L. R. 1 Q. B. 97; *National Bolivian, &c. Co.* v. *Wilson*, 5 App. Cas. 176, 209; *Watteau* v. *Fenwick*, 1893, 1 Q. B. 346; *Kinahan & Co., Ld.* v. *Parry*, 1910, 2 K. B. 389; and see *Montaignac* v. *Shitta*, 15 App. Cas. 357; *Brocklesby* v. *Temperance, &c. Bdg. Socy.*, 1895, A. C. 173.

(*s*) *Trueman* v. *Loder*, 11 A. & E. 589.

(*t*) *Expte. McDonnell*, Buck, 399; above, p. 689.

(*u*) *Drew* v. *Nunn*, 4 Q. B. B. 661; above, p. 689.

(*x*) *Blades* v. *Free*, 9 B. & C. 167; *Smout* v. *Ilbery*, 10 M. & W. 1, 11; above, p. 689; but see per Brett, L. J., *Drew* v. *Nunn*, 4 Q. B. D. 661, 668. In this case the agent would, it seems, be liable under the doctrine of implied warranty of authority; *Halbot* v. *Lens*, 1901, 1 Ch. 344, 349; *Yonge* v. *Toynbee*, 1910, 1 K. B. 215; above, p. 1044.

(*y*) *Hambro* v. *Burnand*, 1904, 2 K. B. 10; cf. above, pp. 806, 927.

a contract of sale.

him, that does not authorise the agent to enter into an open contract for sale of the land, or indeed to make any firm contract for sale binding the principal (*z*). But definite instructions to sell the land authorise the estate agent to sign, on the principal's behalf, a memorandum of an open contract for sale (*a*). So also a solicitor is not justified in signing a contract on behalf of his client without definite instructions to that effect (*b*). The test to be applied in determining whether an agent, in whose hands a house has been placed with a view to letting or sale, is entitled to be paid a commission, is whether the agent's introduction was an efficient cause of bringing about the letting or sale (*c*).

Solicitor's authority.

Test for determining agent's claim to commission.

Where one party bribes the other's agent.

If one party to a sale secretly pay or promise a commission or other bribe to the other party's agent, the other party is entitled, at his election, to avoid the contract for the fraud, or to affirm the contract and obtain such other adequate relief as the Court may think fit to give him (*d*). If he elect to affirm the contract, he has two distinct and cumulative remedies. He may recover from the agent the amount of a commission or bribe received, and he may also recover from the agent and the person who has paid the bribe, jointly or severally, damages for any loss which he has sustained by having entered into the contract, without allowing any deduction for what he has recovered from the agent under the former head (*e*).

Public servant contracting for the use of government.

A servant of the Crown is not personally liable upon contracts made by him, even by deed (*f*), for the use or on account of the government (*g*). He cannot therefore be made liable in

(*z*) *Hamer* v. *Sharp*, L. R. 19 Eq. 108; see also *Saunders* v. *Dence*, 52 L. T. 644, 646; *Chadburn* v. *Moore*, 61 L. J. Ch. 674; *Thuman* v. *Best*, 1907, W. N. 170; *Keen* v. *Mear*, 1920, 2 Ch. 574, 579.

(*a*) *Rosenbaum* v. *Belson*, 1900, 2 Ch. 267; *Keen* v. *Mear*, above.

(*b*) *Smith* v. *Webster*, 3 Ch. D. 49, 57, 58; cf. *Daniels* v. *Trefusis*, 1914, 1 Ch. 788, 798; *North* v. *Loomes*, 1919, 1 Ch. 378, 382, 383.

(*c*) *Nightingale* v. *Parsons*, 1914, 2 K. B. 621.

(*d*) *Panama, &c. Telegraph Co.* v. *India Rubber, &c. Works Co.*, L. R. 10 Ch. 515, 526; *Grant* v. *Gold Exploration, &c., Ld.*, 1900, 1 Q. B. 233, 244, 249; *Moody* v. *Cox*, 1917, 2 Ch. 71, 82, 85, 87; *Alexander* v. *Webber*, 1922, 1 K. B. 642, 644; above, pp. 790, 795, 797, 805-807, 809-812.

(*e*) *Salford Corpn.* v. *Lever*, 1891, 1 Q. B. 168; *Grant* v. *Gold Exploration, &c., Ld.*, 1900, 1 Q. B. 233, 244.

(*f*) *Unwin* v. *Wolseley*, 1 T. R. 674; *Allen* v. *Waldegrave*, 8 Taunt. 566, 574; cf. above, p. 1042.

(*g*) *Macbeath* v. *Haldimand*, 1 T. R. 172; *Gidley* v. *Palmerston*, 3 Brod. & Bing. 275; *Palmer* v. *Hutchinson*, 6 App. Cas. 619.

respect of any such contract under the doctrine of implied warranty of authority (*h*). If, however, the contract were made in his own name and were put in writing without any reference in the memorandum to the fact of his agency for government, he could not adduce parol evidence of the fact in order to escape liability (*i*).

§ 3.—*Of Specific Performance.*

As has been already mentioned (*j*), either party to a sale of land may elect to sue for an order that the contract be specifically performed; and this is the most effective way of enforcing the agreement. In a work like the present it would be out of place to attempt any general account of the law of specific performance; for this the reader is referred to Sir Edward Fry's well-known treatise. We are here concerned only with the subject of specific performance as relating to contracts for the sale of land; and the writer can hardly do more than point out the differences, which exist between the right to recover damages at law for breach of the contract and the right to obtain an order for its specific performance.

Differences between the right to damages and that to specific performance.

In the first place, the jurisdiction of the Court to decree the specific performance of a contract is entirely of equitable origin (*k*); and the nature of the remedy is fundamentally different from that of the right of action at law (*l*). The legal remedy is to recover compensation from the party who does not carry out the agreement; so that a breach of the contract is a condition precedent to the right to sue (*m*). In the equitable proceeding it is pronounced that the contract ought to be and shall be carried out as intended (*n*). A breach of the contract is therefore not *necessarily* a condition precedent to obtaining this relief, though it is usually requisite to induce the Court to interfere (*o*). Then the remedy in question is not attendant upon every kind of contract (*p*); but it has always been con-

The remedy is purely equitable.

(*h*) *Dunn* v. *Macdonald*, 1897, 1 Q. B. 401, 555.
(*i*) Above, p. 1046.
(*j*) Above, pp. 36, 37, 1009, 1011, 1034.
(*k*) See Wms. Real Prop. 174, 175, and n. (*e*), 23rd ed.
(*l*) Fry, Sp. Perf. § 3, 3rd ed.
(*m*) Above, pp. 998-1000, 1009.
(*n*) Seton on Judgments, 2136, 7th ed.
(*o*) Above, p. 1010.
(*p*) Fry, Sp. Perf. §§ 61-89, 3rd ed.

sidered as unquestionably appropriate to contracts for the sale or leasing (*q*) of land (*r*); for the damages recoverable at law for breach of such contracts (*s*) are not in general an adequate compensation to the party injured (*t*). Next, it lies in the judicial discretion of the Court to grant or to withhold the relief in question; though in unobjectionable cases it will be accorded as a matter of course (*u*). And the Court, in exercising this discretion, may have regard to considerations, which do not affect the right to enforce the contract at law, and especially to the parties' conduct (*v*). It follows that the remedy in question is not necessarily to be obtained on mere proof of the facts that an unimpeachable contract was concluded and was broken; facts which would establish the right to recover damages (*x*); for there are several defences to an action for specific performance which are not available in an action on the contract at law.

Lies in the judicial discretion of the Court.

Court may have regard to considerations not attended to at law.

In some cases specific performance may be obtained, where there is no right to damages.

Conversely, there are some cases in which the remedy by specific performance is available to a contractor who has no right to recover damages for breach of the contract (*y*). Thus we have seen that a parol contract partly performed may be ordered to be carried out specifically, although it would be unenforceable at law (*z*). So, if the vendor had made an insubstantial error in the description of the property sold, the resulting deficiency of area or estate would preclude him from enforcing the contract at law; but he might, nevertheless, obtain an order for its specific performance with compensation (*a*). And before the Judicature Acts, when the rule as to time not being essential applied in equity only, a contractor, who was out of time with his own performance of the contract, and therefore precluded at law from enforcing the other party's

(*q*) See above, p. 90, n. (*m*).
(*r*) *Buxton* v. *Lister*, 3 Atk. 383, 384.
(*s*) Above, pp. 1023 *sq*.
(*t*) *Harnett* v. *Yielding*, 2 Sch. & Lef. 549, 553; *Kenney* v. *Wexham*, 6 Madd. 355, 357; *Adderley* v. *Dixon*, 1 S. & S. 607, 610; *Falcke* v. *Gray*, 4 Drew. 651, 657; *Hexter* v. *Pearce*, 1900, 1 Ch. 341, 346; Fry, Sp. Perf. §§ 62, 72, 3rd ed.
(*u*) Above, p. 36; *Hexter* v. *Pearce*, 1900, 1 Ch. 341, 346; *Rudd* v. *Lascelles*, ib. 815, 817; *Holliday* v. *Lockwood*, 1917, 2 Ch. 47, 56, 57.
(*v*) Above, pp. 36, 37, 182-184, 189-192, 758, 765, 766, nn. (*i*), (*m*), 808; *Holliday* v. *Lockwood*, ubi sup.
(*x*) Above, pp. 998-1000, 1009, 1038-1040.
(*y*) Above, p. 1009.
(*z*) Above, p. 12, n. (*r*).
(*a*) Above, pp. 41, 42, 676-679, 753, 754.

obligation, might still succeed as plaintiff in equity in enforcing the specific performance of the contract (*b*). These cases, however, are exceptional. As a general rule, a plaintiff suing for the specific performance of an agreement to sell land must prove that there is an unimpeachable contract (*c*) existing between himself and the defendant, and that the defendant has failed or refuses to carry it out (*d*). It follows that any defence which could be set up in bar of an action upon the contract at law (*e*), will in general defeat an application for its specific performance. Thus proof that no contract was ever concluded as alleged is, of course, a good defence to an action for specific performance (*f*). As to denying that the contract is enforceable, a plea of the Statute of Frauds will be perfectly effectual in the case of an oral contract (*g*), except on a sale by the Court, or unless replied to by proof of fraud or part performance (*h*). Lapse of time as a bar to enforcing the specific performance of contracts is, however, governed by the rules of equity respecting laches, and not by the Statutes of Limitation (*i*). The same

Denial of the formation of the contract.

Denial of the enforceability.

(*b*) Above, pp. 52-54, 543-545, 793, 1038-1040.
(*c*) Above, pp. 1, 2, 739, 845.
(*d*) Above, p. 1010.
(*e*) Above, pp. 1038-1040.
(*f*) See above, pp. 6-20; Fry, Sp. Perf. § 277, 3rd ed. And note that the defence mentioned by Sir E. Fry of the incompleteness of the contract really amounts to a denial either of the formation or of the enforceability of the contract: Fry, Sp. Perf. §§ 337 *sq.*, 3rd ed. It is true that under this head (§§ 355 *sq.*) the learned author discusses the case of a contract to sell at a price to be fixed by some valuer, or two valuers or their umpire; when as a rule the contract is not enforceable unless the price has first been so fixed; above, p. 55. But in this case the *contract* to sell is made subject to the condition precedent that the price shall be so fixed, and the *condition* is such that from its very nature the Court cannot enforce its specific performance; see above, p. 980; below, p. 1055, n. (*a*). It should be noted that if the Court consider that the stipulation as to the manner of ascertaining the price is not essential, and that the real agreement is to sell at the fair value, it will direct a reference to ascertain the price; *Milnes* v. *Gery*, 14 Ves. 400, 407; *Gregory* v. *Mighell*, 18 Ves. 328, 333; *Gourlay* v. *Somerset*, 19 Ves. 429, 431; above, p. 55. And the Court has arrived at this result where the main contract has been to buy some land at a fixed price, and there has been a subsidiary agreement to purchase fixtures at a valuation; *Jackson* v. *Jackson*, 1 Sm. & G. 184; cf. *Darbey* v. *Whitaker*, 4 Drew. 134; and see *Richardson* v. *Smith*, L. R. 5 Ch. 648, 652, 654. As to a contract being void for uncertainty, see *County Hotel, &c. Co.* v. *L. & N. W. Ry. Co.*, 1918, 2 K. B. 251, 262-266; affirmed on other grounds, 1919, 2 K. B. 29, 1921, 1 A. C. 85.
(*g*) *Seagood* v. *Meale*, Prec. Ch. 560; above, pp. 3-10; Fry, Sp. Perf. §§ 498 *sq.*, 3rd ed.
(*h*) Above, pp. 11-13, 1052; Fry, Sp. Perf. §§ 561 *sq.*, 3rd ed.
(*i*) Above, p. 1010; Fry, Sp. Perf. §§ 1071 *sq.*, 3rd ed.

Denial of its validity.

objections may be taken to the validity of the contract in an action for its specific performance as are available to repel a claim for damages for its breach (*j*). Thus the Court will not specifically enforce a contract void *ab initio* for mistake (*k*) or illegality (*l*), or rendered unlawful by some event which has occurred since its formation (*m*). And where a contract has been formed which is voidable for misrepresentation, whether fraudulent or innocent (*n*), or for duress or undue influence (*o*), and the injured party elects to avoid it, that will prevent the other from enforcing its specific performance (*p*). And any legal incapacity (*q*), or relative equitable disability (*r*), which goes to make a contract void or voidable, may be set up against a claim for its specific performance.

Discharge from the contract.

Discharge from the obligation of the contract is in general an equally good defence (*s*); but we have seen that in the case of a discharge by bankruptcy from the legal obligation of the contract, the equitable liability to perform it specifically may remain unimpaired (*t*). So also it is in general a good defence that the plaintiff has not performed some condition precedent to the defendant's liability under the agreement (*u*); but, as we have seen, to bar the plaintiff's claim to enforce the contract specifically, it is not enough to prove his non-performance of some stipulation which is essential at law—it must be shown that the stipulation broken is such as *a Court of Equity* considers to be essential (*v*).

Denial of the breach.

As regards the defence of a denial of the facts alleged to constitute a breach of the contract (*x*), it has been explained that proof that no breach of contract has occurred does not appear to displace the Court's *jurisdiction* to decree specific performance,

(*j*) Above, p. 1038.
(*k*) Above, pp. 743, 766.
(*l*) Above, p. 838; Fry, Sp. Perf. §§ 477 *sq.*, 3rd ed.
(*m*) Above, p. 843; Fry, Sp. Perf. § 477, 3rd ed.
(*n*) Above, pp. 794 *sq.*
(*o*) Above, p. 819 *sq.*
(*p*) Fry, Sp. Perf. §§ 1020, 1059, 3rd ed.
(*q*) Above, pp. 845 *sq.*; Fry, Sp. Perf. §§ 270 *sq.*, 487 *sq.*, 3rd ed.
(*r*) Above, pp. 947 *sq.*
(*s*) Above, pp. 976 *sq.*, 1039.
(*t*) Above, pp. 517, 519, 522, 988, 1006.
(*u*) Above, p. 1039; Fry, Sp. Perf. §§ 922 *sq.*, 3rd ed.; *Brickles* v. *Snell*, 1916, A. C. 599; and consider *Royon* v. *Paul*, cited above, p. 1012, n. (*m*).
(*v*) Above, pp. 1052, 1053; Fry, Sp. Perf. §§ 50, 51, 3rd ed.
(*x*) Above, pp. 998, 1039.

but is in general a good ground for asking the Court not to exercise it, or at least to make the plaintiff pay the costs (*y*).

Defences to a claim for specific performance which would not be available at law.

We will now consider what defences may be set up against a claim for specific performance of the agreement which would not be available to bar an action for breach of the contract at law.

Defence that the Court has no jurisdiction to grant specific performance.

Contract for sale of land comprising a stipulation not specifically enforceable.

We must first notice the defence that the contract is not of that kind which the Court will order to be specifically performed (*z*)—in other words, that the Court has no jurisdiction so to enforce it (*a*). We have seen (*b*) that this plea is inapplicable to a simple sale (*c*) of land. But an agreement partly in the nature of a sale of land may contain some stipulation which by itself alone the Court will not enforce specifically, as an agreement of personal service or employment (*d*), or to

(*y*) Above, pp. 1009, 1051.

(*z*) See Fry, Sp. Perf. Chap. II. §§ 47 *sq.*, 3rd ed.

(*a*) The following are the grounds on which the Court has refused to assume jurisdiction so as to interfere: (1) that the common law remedy exists and is adequate; (2) that the contract is from its nature such as the Court cannot perform; (3) that it would be useless to enforce specific performance; (4) that the Court would be unable to enforce its own judgment; (5) that the enforced performance of the contract would be worse than its non-performance; and (6) that the agreement, though made by deed, is voluntary. On the first ground, the Court declined to assume the jurisdiction in the case of ordinary mercantile contracts for the sale of goods, or contracts for the sale of Government stock: but jurisdiction to order the specific performance of a sale of goods was conferred by the Sale of Goods Act, 1893 (stat. 56 & 57 Vict. c. 71), s. 52. The second ground appears to comprehend the case of a sale of land at a price to be named by a single valuer or two valuers or their umpire; above, pp. 55, 981, 1053, n. (*f*). The fourth ground is the reason alleged for the rule that the Court will not specifically enforce the building or repairing contract or a contract to do continuous acts, as to work mines. On the fifth ground the Court will not order specific performance of a positive contract of service or employment. See Fry, Sp. Perf. §§ 47 *sq.*, 3rd ed. Sir Edward Fry also mentions among the limits of the jurisdiction the cases where the plaintiff has elected to pursue some other remedy (see above, pp. 1034-1036), and where the jurisdiction has been taken away by statute; but these are not grounds on which the Court has never assumed the jurisdiction; they are reasons why an assumed jurisdiction should not be exercised.

(*b*) Above, pp. 1051, 1052.

(*c*) Above, pp. 1, 251, 367, n. (*f*).

(*d*) *Pickering* v. *Bishop of Ely*, 2 Y. & C. C. C. 249, 267, 268; *Stocker* v. *Brockelbank*, 3 Mac. & G. 250, 266; *Johnson* v. *Shrewsbury, &c. Ry. Co.*, 3 De G., M. & G. 914; *Whitwood Chemical Co.* v. *Hardman*, 1891, 2 Ch. 416, 426, 432; Fry, Sp. Perf. §§ 110-115, 3rd ed.

build (*e*), or to repair (*f*), or to do continuous acts, as to work mines (*g*); and it must be considered how far this defence is available where an agreement of this kind is incorporated in a sale of land.

As a rule the Court will not order specific performance unless the entire contract can be so enforced.

As a rule, where some stipulation which the Court cannot specifically enforce forms an integral part of an executory (*h*) contract, the Court will not decree specific performance of the rest of the agreement; for unless the Court can so enforce the entire contract, it will not grant this relief (*i*). And this is equally the case whether the stipulation is to be performed by the plaintiff or the defendant; for though the plaintiff might submit to perform it, the Court could not enforce it specifically, if he failed to observe his submission (*k*). Thus, if part of the consideration for a contract to convey land be an agreement of personal service or employment, or to do continuous acts, as to work mines, the Court will not order the contract to be specifically performed (*l*). If, however, a contract contain an agreement to sell land, together with other stipulations, and be made in such terms that the contract for the sale of the land is complete in itself and severable from the rest of the agreement, the sale alone may be specifically enforced (*m*). In such

Where the stipulation is severable from the rest of the contract.

(*e*) *Kay* v. *Johnson*, 2 H. & M. 118, 124; *Ryan* v. *Mutual Tontine, &c. Assn.*, 1893, 1 Ch. 116, 128; *Wolverhampton Corpn.* v. *Emmons*, 1901, 1 K. B. 515, 523, 524; Fry, Sp. Perf. § 98, 3rd ed.

(*f*) *Flint* v. *Brandon*, 8 Ves. 159; *Paxton* v. *Newton*, 2 Sm. & G. 437, 440.

(*g*) *Booth* v. *Pollard*, 4 Y. & C. Ex. 61; *Pollard* v. *Clayton*, 1 K. & J. 462; *Blackett* v. *Bates*, L. R. 1 Ch. 117; *Powell, &c. Co.* v. *Taff Vale Ry. Co.*, L. R. 9 Ch. 331; Fry, Sp. Perf. § 99, 3rd ed.

(*h*) This rule has no application where an injunction is sought to restrain a breach of some stipulation contained in an executed contract; *Wolverhampton, &c. Ry. Co.* v. *London and North Western Ry. Co.*, L. R. 16 Eq. 433, 439; Fry, Sp. Perf. §§ 841-844, 3rd ed.

(*i*) *Gervais* v. *Edwards*, 2 Dr. & War. 80; *Nickels* v. *Hancock*, 7 De G., M. & G. 300, 327; *Stocker* v. *Wedderburn*, 3 K. & J. 393; *Ogden* v. *Fossick*, 4 De G., F. & J. 426; *Merchants' Trading Co.* v. *Banner*, L. R. 12 Eq. 18, 23; *Frith* v. *Frith*, 1906, A. C. 254, 261; Fry, Sp. Perf. §§ 821, 830-835, 3rd ed.

(*k*) *Stocker* v. *Wedderburn*, 3 K. & J. 393; *Ogden* v. *Fossick*, 4 De G., F. & J. 426; Fry, Sp. Perf. § 834, 3rd ed. But if the stipulation is to be performed by the defendant, the plaintiff may waive its performance, and so obtain an order for the specific performance of the rest of the contract; *Soames* v. *Edge*, John. 669, 672, 673.

(*l*) Above, p. 989.

(*m*) *Croome* v. *Lediard*, 2 My. & K. 251; *Richardson* v. *Smith*, L. R. 5 Ch. 648; *Odessa Tramways Co.* v. *Mendel*, 8 Ch. D. 235; *Starkey* v. *Barton*, 1909, 1 Ch. 284, 290, where an order was made

cases the question, whether the sale is complete in itself and severable from the rest of the agreement, is, of course, a question of the parties' intention, to be gathered from the terms of the agreement (*m*). And where the stipulation really is, not that the contractor shall do acts which the Court would not enforce specifically, but that he shall covenant to do such acts, the rule does not apply, as the Court will oblige him to execute a deed of covenant (*n*). Where the stipulation is for the plaintiff's benefit, so that he might have waived it and then enforced the contract specifically (*o*), and it is not performed owing to the defendant's default, the Court may, since Lord Cairns' Act (*p*), order specific performance of the rest of the contract, and give damages for breach of the stipulation (*q*). The rule regarding building contracts (*r*) is subject to the exception that the Court will specifically enforce an agreement to erect buildings or execute other works on land where these conditions are satisfied: (1) that the works to be carried out be sufficiently ascertained; (2) that the plaintiff's interest in their completion be such that damages would be no adequate compensation for non-performance of the agreement; and (3) that the defendant be in possession of the land on which the works are to be done (*s*). If, therefore, a stipulation be made on the sale of land that the purchaser shall erect a house or other buildings, or make a road, on the land sold (*t*), and the land be conveyed or possession

Where the stipulation is to covenant to do some act.

Where the stipulation is for the plaintiff's benefit, and is unperformed through the defendant's default.

Conditions in which a building contract will be specifically enforced.

for specific performance of a contract of sale containing a stipulation that part of the purchase money should be left on mortgage; Fry, Sp. Perf. § 822.

(*m*) See note (*m*), previous page.

(*n*) *Granville* v. *Betts*, 18 L. J. N. S. Ch. 32; *Wilson* v. *West Hartlepool Ry. Co.*, 2 De G., J. & S. 475, 488, 495.

(*o*) Above, n. (*k*), p. 1056.

(*p*) Stat. 21 & 22 Vict. c. 27, which gave to the Court of Chancery jurisdiction to award damages in addition to or substitution for specific performance; see *Lewers* v. *Shaftesbury*, L. R. 2 Eq. 270. This Act was repealed by stat. 46 & 47 Vict. c. 49, but saving the jurisdiction thereby established; see *Sayers* v. *Collyer*, 28 Ch. D. 103, 107, 108; *Re R.*, 1906, 1 Ch. 730.

(*q*) *Soames* v. *Edge*, John. 669; *Samuda* v. *Lawford*, 4 Giff. 42; *Kay* v. *Johnson*, 2 H. & M. 118; *Middleton* v. *Greenwood*, 2 De G., J. & S. 142; *London Corpn.* v. *Southgate*, 38 L. J. Ch. 141; Fry, Sp. Perf. §§ 849, 850, 3rd ed.

(*r*) Above, p. 1056.

(*s*) *Wolverhampton Corpn.* v. *Emmons*, 1901, 1 K. B. 515, 525 (adopting the rule stated in Fry, Sp. Perf. § 103, 3rd ed., and based on *Storer* v. *Great Western Ry. Co.*, 2 Y. & C. C. C. 48; *Sanderson* v. *Cockermouth, &c. Ry. Co.*, 11 Beav. 497; *Lytton* v. *Great Northern Ry. Co.*, 2 K. & J. 394; *Wilson* v. *Furness Ry. Co.*, L. R. 9 Eq. 28); *Molyneux* v. *Richard*, 1906, 1 Ch. 34.

(*t*) Above, pp. 468, 632.

thereof be given to him pursuant to the contract, the agreement to build may be specifically enforced against him, provided it be sufficiently certain and the vendor's interest in its performance would not be adequately satisfied by payment of damages (*u*). This would be the case where the sale was made in consideration of a rentcharge to be reserved to the vendor (*x*), or where he would have an interest in the use or maintenance of the buildings, works, or road, either by way of reservation or as an adjoining landowner, or as one of the public (*y*). On the same principle, where it is part of an agreement to sell land that the vendor shall execute works on adjoining land of his own, the agreement may be specifically enforced against him (*z*). It may be observed that the exception thus established seems to do away with the alleged ground of the rule (*a*) as to the non-enforcement of building contracts, viz., that the Court could not carry out its judgment (*b*); and there is some authority to the effect that the Court has jurisdiction to order specific performance of a building contract if sufficiently certain (*c*). But in a recent case upon the subject the rule was affirmed by the Court of Appeal, and the exception defined as above stated (*d*).

Agreement to pay a fixed sum as a penalty or as liquidated damages for breach of contract.

It may be observed that the Court does not consider an agreement to pay a fixed sum, in case of a breach of contract (*e*), whether as a penalty or as liquidated damages, to be a good ground for ousting its jurisdiction to enforce specific perform-

(*u*) See *Mosely* v. *Virgin*, 3 Ves. 184, 186; *Wilson* v. *Northampton, &c. Ry. Co.*, L. R. 9 Ch. 279.

(*x*) Above, pp. 631, 632. Consider *Mosely* v. *Virgin*, 3 Ves. 184, where, however, specific performance was refused on the ground of uncertainty; *Soames* v. *Edge*, John. 669; *London Corpn.* v. *Southgate*, 38 L. J. Ch. 141; *Cubitt* v. *Smith*, 10 Jur. N. S. 1123.

(*y*) *Price* v. *Penzance Corpn.*, 4 Hare, 506; and cases cited in n. (*s*), above, p. 1057.

(*z*) Consider *Wells* v. *Maxwell*, 32 Beav. 408, 419, affirmed 9 Jur. N. S. 1021.

(*a*) Above, p. 1055, n. (*a*).

(*b*) See Collins, L. J., *Wolverhampton Corpn.* v. *Emmons*, 1901, 1 K. B. 515, 524.

(*c*) *Mosely* v. *Virgin*, 3 Ves. 184, 185; *Hepburn* v. *Leather*, 50 L. T. 660. In the latter case Bacon, V.-C., decreed specific performance of a covenant by a purchaser contained in the conveyance to him to erect buildings on adjoining land of the vendor. It is submitted, however, that in this case damages would have been an adequate compensation to the vendor, who, on receiving the cost of the works, might have executed them on his own land without any loss to himself.

(*d*) *Wolverhampton Corpn.* v. *Emmons*, 1901, 1 K. B. 515.

(*e*) Wms. Pers. Prop. 213, 17th ed.

ance (*f*). To effect this it is necessary that the agreement shall really be to do some act or else to pay a sum of money instead, so that it shall be in the election of the contractor to pay the money as a *performance* of the contract, and not as a penalty or as damages for its non-performance (*g*).

Defences not available at law.

Apart from the question of the existence of the jurisdiction to grant specific performance (*h*), the defences, not available at law, to a claim for specific performance appear to be these:—(1) The uncertainty of the contract; (2) unfairness, including innocent misrepresentation not amounting to a cause for rescinding the contract; (3) hardship; (4) mistake; (5) that to carry out the contract would involve a breach of some superior equity; (6) want of mutuality; (7) the plaintiff's not continuing ready and willing to perform his part of the agreement; (8) his laches; and (9) the doubtfulness of the title. Of each of these in turn.

Uncertainty of the contract.

As to the uncertainty of the contract, if at law the agreement be void for uncertainty, there can be no question of enforcing its specific performance; in that case no contract has been concluded (*i*). But it may be a defence to a claim for specific performance of a contract that the acts agreed to be done are not defined with sufficient certainty to enable the Court to decree their performance *in specie;* notwithstanding that those acts may be sufficiently ascertainable to enable the Court to award damages for their non-performance (*k*). Thus specific performance has been refused of a contract "to lay out 1,000*l.* in building" on particular lands, because of its uncertainty,

(*f*) *Howard* v. *Hopkyns,* 2 Atk. 371; *French* v. *Macale,* 2 Dr. & War. 269, 274 *sq.; Coles* v. *Sims,* 5 De G., M. & G. 1, 11; *Bird* v. *Lake,* 1 H. & M. 111.

(*g*) See *French* v. *Macale,* 2 Dr. & War. 269, 275; Fry, Sp. Perf. §§ 140-164, 3rd ed.

(*h*) Above, p. 1055.

(*i*) Above, p. 1053, n. (*f*).

(*k*) *Mosely* v. *Virgin,* 3 Ves. 184; *Hodges* v. *Horsfall,* 1 Russ. & My. 116; *Stuart* v. *London and North Western Ry. Co.,* 1 De G., M. & G. 721; *Paris Chocolate Co.* v. *Crystal Palace Co.,* 3 Sm. & G. 119; *Taylor* v. *Portington,* 7 De G., M. & G. 328; *Greenhill* v. *Isle of Wight, &c. Ry. Co.,* 19 W. R. 345; *Pearce* v. *Watts,* L. R. 20 Eq. 492; *Douglas* v. *Baynes,* 1908, A. C. 477, 486; Fry, Sp. Perf. §§ 380 *sq.,* 3rd ed.

although in other respects the conditions which induce the Court to enforce a building contract (*l*) were satisfied (*m*).

Unfairness.

With regard to unfairness, it has been laid down, generally, that an agreement must be fair, or the Court will not order its specific performance (*n*). This proposition, however, is not now construed in the sense that the Court will not specifically enforce any contract, unless the advantages to be secured by the parties be reasonably equivalent, or their conduct be distinguished by a higher degree of good faith than the law ordinarily exacts from contractors. Indeed, it hardly amounts to more than an assertion that the Court, in exercising its discretion to grant this remedy, may have regard to considerations of unfairness either in the terms of the agreement or in the parties' conduct in making the bargain. Thus we have seen (*o*) that at the present day the better opinion is that the Court will not refuse specific performance of a contract to sell land on the sole ground of inadequacy of consideration; although unfairness in the terms of a bargain coupled with circumstances of inequality in the parties' position may be evidence of undue influence or fraud (*p*). So also it has been mentioned (*q*) that, according to the latest authority, a vendor of land may enforce the sale specifically, notwithstanding that he kept silence as to a latent defect of quality known to himself (*r*). In these respects it does not appear that a higher standard of conduct is required in equity than at law (*r*). Still, there may be such unfairness about a contract that the Court will decline to order its specific performance, although the facts would not warrant an order for its rescission. An example of this occurs in the case of innocent misrepresentation (*s*); and the same rule is applicable in the case of any unfairness in the nature of fraud or undue influence, but not amounting exactly to a cause for setting the agreement aside (*t*). A notable example occurs in the case of

(*l*) Above, p. 1057.
(*m*) *Mosely* v. *Virgin*, 3 Ves. 184.
(*n*) Hardwicke, C., *Buxton* v. *Lister*, 3 Atk. 383, 386; Rosslyn, C., *Walpole* v. *Orford*, 3 Ves. 402, 420; Fry, Sp. Perf. § 334, 3rd ed.
(*o*) Above, p. 828.
(*p*) Above, pp. 825-827.
(*q*) Above, p. 757.
(*r*) Above, pp. 757, 827.
(*s*) Above, p. 808.
(*t*) *Willan* v. *Willan*, 16 Ves. 72, 83; Fry, Sp. Perf. § 387, 3rd ed.; see above, p. 758, and n. (*k*).

Twining v. *Morrice* (*u*), where specific performance of a contract to sell land was refused to the purchaser, because he had (in perfect good faith) employed the solicitor known to be acting for the vendor to bid for him at the auction, a circumstance which the Court considered likely to damp the sale. In that case the Court acquitted the parties of all moral blame. As regards the sale of land, the most prominent instances of unfairness occur in connection with the statement in the contract of the nature of the vendor's title, or of the interest offered for sale, or of conditions restrictive of the purchaser's right to investigate the title. In these respects the contract is in equity *uberrimæ fidei* (*x*); and if anything be unfairly stated or suppressed so as to mislead the purchaser, he may resist specific performance of the contract, although the facts may not support a claim to rescind the contract and recover the deposit (*y*).

Twining v. *Morrice.*

The defence of innocent misrepresentation not amounting to a cause of rescission of the contract has been already considered (*z*). It appears to be an example of the application of the general principle that the Court may have regard to the fairness of the parties' conduct (*a*). On this ground the Court is enabled to reject a claim for specific performance by a party whose statement or conduct has been misleading, though it has not amounted to a false representation inducing the contract (*b*).

Innocent misrepresentation not amounting to a cause of rescission.

We have seen (*c*) that the Court may decline to grant the remedy of specific performance on the ground that it would work great hardship on the defendant. But the defence of hardship, like that of unfairness (*d*), cannot be set up to avoid carrying out what is commonly called a hard bargain; that is to say, where the sole ground of objection is really the inadequacy of the consideration (*e*). Like unfairness also, hardship

Hardship.

(*u*) 2 Bro. C. C. 326.
(*x*) Above, pp. 758, and nn. (*i*), (*m*), 807; *Brandling* v. *Plummer*, 2 Drew. 427, 429.
(*y*) Above, pp. 37, 66, n. (*b*), 182-184, 189-195, 808.
(*z*) Above, p. 808, and nn. (*k*), (*l*).
(*a*) Above, p. 1060.
(*b*) Consider *Denny* v. *Hancock*, L. R. 6 Ch. 1; above, p. 808, and nn. (*k*), (*l*).
(*c*) Above, pp. 758, 764, 765; and see Fry, Sp. Perf. §§ 417 *sq.*, 3rd ed.
(*d*) Above, p. 1060.
(*e*) Above, pp. 827, 828; *Haywood* v. *Cope*, 25 Beav. 140, 150-153.

is usually asserted in connexion with other circumstances, such as mistake. And it has been shown that, where a man has been induced to enter into a contract by his own mistake, and it would work great hardship on him to oblige him to carry it out, the Court will decline to enforce specific performance against him, notwithstanding that, being estopped at law from asserting his own mistake (*f*), he has no defence to an action for damages for breach of the contract (*g*). Still, in some cases, hardship alone appears to be a sufficient defence (*h*). Thus the Court has declined to grant specific performance of a contract to buy a close of land entirely surrounded by the lands of strangers to the agreement, which provided no certain means of access (*i*). And it has been observed that the Court will not enforce specific performance of a contract to buy a property which would be positively noxious to its purchaser—such as a house so used as to subject its possessor to legal penalties, or so infected with the germs of disease that it is dangerous to enter it (*k*). And specific performance has been refused on the ground that the result would inevitably be to subject the defendant to a forfeiture (*l*).

Mistake.

Mistake, as a ground for resisting the specific performance of a contract, has already been fully considered (*m*).

Contract involving a breach of some superior equity.

The Court will not enforce specifically a contract of which the performance would be in contravention of some superior equity affecting the subject of the agreement; as where the completion of a sale of land would involve a breach of trust, or a breach of a prior contract affecting the land in equity (*n*). This rule has been referred to the grounds of unfairness and

(*f*) Above, pp. 742-747, 752, 763 *sq.*
(*g*) Above, pp. 677, 679, 764, 765.
(*h*) See cases cited above, p. 758, n. (*i*).
(*i*) *Denne* v. *Light,* 8 De G., M. & G. 774.
(*k*) Above, p. 761.
(*l*) *Faine* v. *Brown,* cited 2 Ves. sen. 307; *Peacock* v. *Penson,* 11 Beav. 355; see *Helling* v. *Lumley,* 3 De G. & J. 493, 498.
(*m*) Above, pp. 763-766.
(*n*) *Mortlock* v. *Buller,* 10 Ves. 292, 312; *Harnett* v. *Yielding,* 2 Sch. & Lef. 549, 554; *Ord* v. *Noel,* 5 Madd. 438; *Wood* v. *Richardson,* 4 Beav. 174, 176, 177; *Thompson* v. *Blackstone,* 6 Beav. 470; *Rede* v. *Oakes,* 4 De G., J. & S. 505, 512, 513, 515; *Willmott* v. *Barber,* 15 Ch. D. 96, 107; *Dunn* v. *Flood,* 28 Ch. D. 586, 590; *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.,* 1900, 2 Ch. 352, 366, 367, 1901, 2 Ch. 37, 51; *Corbett* v. *South Eastern & Chatham Ry. Co.'s Managing Committee,* 1905, 2 Ch. 280, 287, reversed, 1906, 2 Ch. 12.

hardship (*o*); but its true reason appears to be that the Court will not stultify itself by ordering the specific performance of an act which would be in exact contravention of the rules of equity—the very rules which the Court sits in its place to uphold (*p*). It is thought that the principle of the rule is apparent when it is considered that this defence may be raised by either party; even by a contractor who, in entering into the agreement, had contemplated a breach of his own duty, against a plaintiff who had contracted without notice of the breach of duty involved (*q*). Here the defendant could hardly plead unfairness or hardship, when it was his own disregard of his duty that placed him in a difficult position (*r*).

Want of mutuality.

The defence of want of mutuality is the objection that the defendant, owing to the plaintiff's legal incapacity or otherwise, would have no right to enforce the agreement specifically as against the plaintiff, so that the remedy is not mutual. Where this is the case the Court will decline to grant specific performance at the plaintiff's suit (*s*). We have seen that on this ground an infant is precluded from so enforcing any contract made with him (*t*); and a married woman subject to the common law could not pursue this remedy in case of her agreement to sell or buy land (*u*). It is said that, as a rule, the Court, in considering this objection, has regard to the time of making the contract (*x*); and it is true that if the remedy were then mutual, a party who has subsequently lost his right to specific performance by his own conduct, as by his laches, cannot plead want of mutuality against the other party, who is not in default (*y*). But it is established that where the remedy was not mutual at the making of the contract, but the party not originally bound has subsequently, being then *sui juris*, confirmed the contract, he may enforce the contract specifically,

(*o*) Fry, Sp. Perf. § 407, 3rd ed.
(*p*) See note (*n*), above, p. 1062.
(*q*) *Ord* v. *Noel*, 5 Madd. 438; and consider *Dance* v. *Goldingham*, L. R. 8 Ch. 902, 911, 913; and see above, pp. 249, and n. (*z*), 250.
(*r*) Consider *Helling* v. *Lumley*, 3 De G. & J. 493.
(*s*) *Hamilton* v. *Grant*, 3 Dow, 33, 42; *Flight* v. *Bolland*, 4 Russ. 298, 301; *Pickering* v. *Bishop of Ely*, 2 Y. & C. C. C. 249, 267.
(*t*) Above, p. 858.
(*u*) Above, pp. 898, 899.
(*x*) Fry, Sp. Perf. §§ 460, 463, 3rd ed.
(*y*) *South Eastern Ry. Co.* v. *Knott*, 10 Hare, 122, 125, 126; *Hawkes* v. *Eastern Counties Ry. Co.*, 1 De G., M. & G. 737, 755, 5 H. L. C. 331, 365.

and cannot be met with the defence of want of mutuality. Thus we have seen (*z*) that, on this principle, a party who has not signed the memorandum of a contract to sell land may enforce specific performance against one who has signed the memorandum; and an infant, after he has attained full age, might formerly so enforce a contract made during infancy; for in these cases the plaintiff necessarily submits to perform his part of the agreement, and so affirms his liability thereunder. So where a principal has ratified a contract made on his behalf, but without his authority, by his agent (*a*), he can enforce the contract specifically, notwithstanding the original want of mutuality (*b*). And the same rule applies in every case in which a contract was at first voidable at the option of one of the parties, but he has elected to affirm it (*c*). Conversely, where one party to a contract is originally in no position to enforce it, owing to his inability to perform some essential stipulation (*d*), and the other waives this objection and continues to treat the contract as still subsisting, the latter cannot plead the original want of mutuality if the former, having become enabled to perform the stipulation, sue for specific performance of the agreement. Thus, where a vendor of land cannot show a good title according to the contract, and the purchaser does not insist on this objection as putting an end to the agreement, but negotiates with the object of removing it, and the vendor subsequently acquires a good title, the vendor may sue for specific performance of the contract, and the purchaser cannot rely on the original want of mutuality (*e*). From these instances it appears that what is fatal to a claim for specific performance is want of mutuality at the time of bringing the action (*f*); though a defendant who has *lost* this remedy by his own misconduct is precluded from taking such an objection. Similarly, want of mutuality cannot be pleaded in bar of a purchaser's right to enforce specific performance with compensation (*g*); for, as we have seen (*h*), in such case

(*z*) Above, p. 858, and n. (*r*).
(*a*) Above, pp. 1041, 1042.
(*b*) Consider *Firth* v. *Greenwood*, 1 Jur. N. S. 866.
(*c*) Above, pp. 809, 810, 830, 966.
(*d*) Above, p. 1054.
(*e*) Above, pp. 154, and n. (*u*), 156; and see p. 154, n. (*d*).
(*f*) *Hawkes* v. *Eastern Counties Ry. Co.*, 1 De G., M. & G. 737, 755, 5 H. L. C. 331, 365.
(*g*) Fry, Sp. Perf. §§ 473-476, 3rd ed.
(*h*) Above, p. 678.

the vendor is estopped from asserting his own want of a complete title. Where a contract for sale of land is subject to some condition precedent (*i*) to be performed by one of the parties, it is, of course, no objection to enforcing it specifically after the condition has been performed, that there was previously no mutuality of remedy (*k*); for until performance of the condition there was no enforceable agreement (*l*).

Contract subject to a condition precedent.

When a man sues for the specific performance of a contract he must show that he has ever been and continues to be ready and willing to perform his part of the agreement (*m*). Not only, therefore, must he have performed or have been ready and willing to perform all stipulations on his part, which are regarded in equity as essential (*n*), up to the time of bringing his action; but if he *subsequently* do any act which precludes him from carrying out his part of the contract, that will afford a defence to his claim; and this defence may be taken by a defendant who has himself broken the contract. Thus, if a purchaser of land make default in carrying out the contract, and the vendor sue to enforce it specifically, it will be a good defence that the vendor has *subsequently* made some sale or other disposition of the land, which effectually prevents him from completing the contract (*o*). This would be no defence to a claim by the vendor for damages for the purchaser's breach of contract (*o*).

The plaintiff's not continuing ready and willing to perform his part of the contract.

It is well established that the Court will not grant or enforce the relief of specific performance of a contract, unless the party seeking this remedy apply promptly, that is, as soon as the nature of the case will permit (*p*), and diligently prosecute

Laches.

(*i*) Above, p. 980.

(*k*) See *Weeding* v. *Weeding*, 1 J. & H. 424, 425, a case of an option to purchase duly exercised; Fry, Sp. Perf. § 465, 3rd ed.

(*l*) Above, p. 980.

(*m*) Fry, Sp. Perf. § 922, 3rd ed.

(*n*) Above, p. 1054. Thus where time is of the essence of the contract as regards the date for completion, and the purchaser is in default at the day fixed for completion, and the vendor is then able and willing to convey, the purchaser is not entitled to specific performance; *Brickles* v. *Snell*, 1916, 2 A. C. 599, 603-4; see above, pp. 543-545.

(*o*) *Hipgrave* v. *Case*, 28 Ch. D. 356; see above, p. 1040.

(*p*) *Milward* v. *Thanet*, 5 Ves. 720, n.; *Eads* v. *Williams*, 4 De G., M. & G. 674, 691; *Mills* v. *Haywood*, 6 Ch. D. 196, 202; *Levy* v. *Stogdon*, 1898, 1 Ch. 478, 484, affd. 1899, 1 Ch. 5; Fry, Sp. Perf. §§ 1100-1102, 3rd ed.

the proceedings, when once his action has been brought (*q*). No particular time can be specified within which an action for specific performance of a sale of land must necessarily be brought, in order to prevent the defence of laches. Each case will be judged according to its own particular circumstances; and the question is whether proceedings have been commenced within a reasonable time (*r*). Where one party has taken some objection and declines to complete the contract in the manner proposed by the other, there is of course no necessity for the other to take proceedings, so long as the parties are negotiating with a view to the removal of the objection. But when once such negotiations have been declined or broken off, and the other party has been definitely informed that the objector insists on his objection and claims to repudiate the contract on that account, the other should lose no time in instituting proceedings, if he intend to claim specific performance of the contract (*s*). Of course, he need not issue a writ or a summons on the very next day; he is no doubt entitled to a reasonable time to obtain advice as to his rights in the matter and to consider such advice when obtained. But he must be prompt both in consulting counsel and in making up his mind. In such circumstances a delay of one year has been held to be fatal (*t*); and where the nature of the property sold is such as to make time of the essence of the contract (*u*), as in the case of a sale of a leasehold colliery, even a period of three months and a half has been considered too long (*x*).

Doubtfulness of the title.

As to the doubtfulness of the title as a defence to an action for specific performance, it is established that the Court will not oblige the purchaser to perform specifically a contract for the sale of land, if the title shown by the vendor be such as the Court considers too doubtful to force upon an unwilling

(*q*) *Moore* v. *Blake*, 1 Ball & B. 62, 69.

(*r*) *Huxham* v. *Llewellyn*, 21 W. R. 570, 571; see *Howe* v. *Smith*, 29 Ch. D. 89, 91.

(*s*) See *Walker* v. *Jeffreys*, 1 Hare, 341, 348; *Southcomb* v. *Bp. of Exeter*, 6 Hare, 213, 219, 220; *Parkin* v. *Thorold*, 16 Beav. 59, 73; *Lehmann* v. *McArthur*, L. R. 3 Ch. 496, 504.

(*t*) *Watson* v. *Reid*, 1 Russ. & My. 236; see also *Heaphy* v. *Hill*, 2 S. & S. 29; *Southcomb* v. *Bp. of Exeter*, 6 Hare, 213; *Eads* v. *Williams*, 4 De G., M. & G. 674.

(*u*) Above, pp. 53, 54, 544.

(*x*) *Glasbrook* v. *Richardson*, 23 W. R. 51; see also *Huxham* v. *Llewellyn*, 21 W. R. 570, 766.

purchaser (*y*). We have seen (*z*) that it is a condition precedent to the enforcement of a contract for the sale of land that the vendor shall show a good title to the property sold, and that this rule appears to be of equitable origin. On the principle that he who seeks equity must do equity, Courts of Equity would not grant the extraordinary relief of a decree for specific performance against a purchaser of land, unless the vendor proved that he had the right to convey what he had contracted to sell and could show good title for its secure enjoyment by the purchaser (*a*). On this ground it was established that in every suit for specific performance of a sale of land, whether brought by the vendor (*a*) or the purchaser (*b*), it is the purchaser's right (*c*) to have an inquiry directed, whether a good title can be made to the property sold (*d*); that is, a good title according to the contract (*e*). If the Court consider the title to be good, the purchaser must carry out the contract (*f*), subject of course to his right of appealing from the judge's decision. If it be certified that a good title cannot be made, he is entitled to rescind the contract or to claim damages for its breach (*g*). But the decision of the Court as to the validity or invalidity of the title is only binding on the parties to the action and those

Inquiry as to title.

(*y*) *Marlow* v. *Smith*, 2 P. W. 198; *Shapland* v. *Smith*, 1 Bro. C. C. 75; *Cooper* v. *Denne*, 4 Bro. C. C. 80, 1 Ves. jun. 665; *Sheffield* v. *Mulgrave*, 2 Ves. jun. 526; *Roake* v. *Kidd*, 5 Ves. 647; *Vancouver* v. *Bliss*, 11 Ves. 458, 464-466; *Sloper* v. *Fish*, 2 V. & B. 149; *Blosse* v. *Clanmorris*, 3 Bligh, 62, 71; *Willcox* v. *Bellaers*, T. & R. 491; *Pyrke* v. *Waddingham*, 10 Hare, 1, 7, *sq.*; *Collard* v. *Sampson*, 4 De G., M. & G. 224; *Parker* v. *Tootal*, 11 H. L. C. 143, 158; above, pp. 122, and n. (*k*), 123 and n. (*m*), 183, 192, 350.

(*z*) Above, pp. 88, 792, 793, 1001.

(*a*) Above, p. 88, and n. (*b*).

(*b*) *Bennett* v. *Fowler*, 2 Beav. 302; see above, p. 83.

(*c*) The right is the purchaser's only; *Bennett* v. *Fowler*, 2 Beav. 302, and the vendor is not entitled to raise any objection to his own title; *Bradley* v. *Munton*, 15 Beav. 460.

(*d*) Above, p. 152, n. (*o*).

(*e*) *Upperton* v. *Nickolson*, L. R. 6 Ch. 436, 442; above, p. 83, and n. (*d*). The inquiry as to title takes place in the judge's chambers; any point in dispute may be referred to one of the conveyancing counsel to the Court for his opinion; after which the point raised may be discussed before the master, and, if necessary, reserved for the decision of the judge in chambers or in court. The decision of the Court as to the title is then embodied in the master's certificate, which becomes binding on all parties to the action, unless within eight days an application be made to discharge or vary it; R. S. C. 1883, Ords. LI. r. 7, LV. rr. 65, 69, 70; Dan. Chan. Pract. 1005, 1205, 8th ed.; Dan. Chan. Forms, 738, 792, 6th ed.; 2 Dart, V. & P. 1099, 5th ed.; 1228, 6th ed.; 1110, 7th ed.; Fry, Sp. Perf. §§ 1372, 1376, 3rd ed.

(*f*) Seton on Judgments, 2176, 7th ed.

(*g*) Ib. 2177; above, pp. 1001, 1011-1014, 1036.

claiming under them (*h*); and the Courts of Equity have considered that, before a purchaser of land shall be obliged to perform the contract specifically, he shall (subject to the special stipulations contained in the agreement) have such a title as he in his turn will be able to force upon purchasers from him (*i*). Hence it is that if the Court consider it to be doubtful whether the title attains this standard, the Court will simply decline to enforce the contract *specifically* (*k*), without prejudice, as it appears (*l*), to the vendor's right to retain the deposit or to recover damages for the purchaser's refusal to perform the agreement.

It is impossible to state exhaustively in what circumstances the Court will consider a title too doubtful to be forced upon an unwilling purchaser. The practice of the Court has fluctuated; and even the principles upon which it acts are by no means perfectly ascertained (*m*). By the labours of Sir Edward Fry (*n*), the decisions on this subject have been partially classified, and the substance of this classification is given below.

Reasonable probability of litigation.

In the first place, the Court will not oblige the purchaser to take the title where it is reasonably probable that its acceptance would involve him in litigation (*o*). In other words, the Court will not compel the purchaser to buy a law suit (*p*). But the litigation contemplated must be such as, in the opinion of the Court, may possibly be successful (*q*). And if a stranger to

(*h*) *Rose* v. *Calland*, 5 Ves. 186, 188, 189; *Pyrke* v. *Waddingham*, 10 Hare, 1, 10; *Osborne to Rowlett*, 13 Ch. D. 774, 781; *Re Ailesbury Settled Estates*, 62 L. J. Ch. 1012.

(*i*) See *Braybroke* v. *Inskip*, 8 Ves. 417, 428; *Pyrke* v. *Waddingham*, 10 Hare, 1, 8.

(*k*) Above, pp. 1066, 1067, and n. (*y*).

(*l*) Above, pp. 1036-1038.

(*m*) See case cited, below, p. 1069, n. (*x*); Fry, Sp. Perf. §§ 882-888, 3rd ed.

(*n*) Fry, Sp. Perf. §§ 890, 891, 3rd ed. The reader is also referred to the summary of cases on this subject contained in 2 Dart, V. & P. 1137, 5th ed.; 1272, 6th ed.

(*o*) *Cattell* v. *Corrall*, 4 Y. & C. Ex. 228, 237; *Pegler* v. *White*, 33 Beav. 403; *Re New Land Development Assn. and Gray*, 1892, 2 Ch. 138, 145, 146, 147; *Scott* v. *Alvarez*, 1895, 2 Ch. 603, 613 (above, pp. 191, 192); *Re Hollis's Hospital and Hague's Contract*, 1899, 2 Ch. 540, 555 (above, p. 637, n. (*m*)).

(*p*) *Rose* v. *Calland*, 5 Ves. 186, 187; *Sharp* v. *Adcock*, 4 Russ. 374, 375.

(*q*) See *Lyddal* v. *Weston*, 2 Atk. 19; *Glass* v. *Richardson*, 9 Hare,

the contract assert some claim on the land sold, which the Court considers to be entirely unfounded, the Court will enforce the contract specifically, notwithstanding that the stranger have commenced proceedings against the vendor, and registered them as a *lis pendens* (*r*). Possibly the whole sum and substance of the rule about too doubtful titles is contained in the proposition that specific performance will not be decreed against a purchaser if it would expose him to the risk of litigation at suit of a stranger to the contract asserting, with apparent or reasonably possible right (*s*), a claim adverse to the title shown (*t*). But the following points should be particularly mentioned, though perhaps they are merely corollaries to this proposition.

Questions of law: previous adverse decision of equal Court, though doubted.

Previous favourable decision doubted.

Adverse decision of inferior Court.

As regards doubtful questions of law:—The Court considers the title too doubtful where there has been a decision of a Court of co-ordinate jurisdiction adverse to the title or to the principle on which the title depends, although the Court thinks that decision to be wrong (*u*); or where there has been a similar decision favourable to the title, but the Court is of opinion that the decision was not right (*u*). But at the present time the Court of Appeal, or other superior Court, does not consider the title to be too doubtful merely because a Court of inferior jurisdiction has pronounced a decision adverse to the title, if the Superior Court think that decision to be clearly wrong (*x*).

698, 701; *Falkner* v. *Equitable Reversionary Society,* 4 Jur. N. S. 1214, 1217, 1218 (the remarks referred to in the text are not reported in *S. C.*, 4 Drew. 352); *Mogridge* v. *Clapp,* 1892, 3 Ch. 382, 396; *Re Maskell and Goldfinch's contract,* 1895, 2 Ch. 525, 529; *Re Marshall and Salt's contract,* 1900, 2 Ch. 202, 204, 205.

(*r*) *Bull* v. *Hutchens,* 32 Beav. 615; above, pp. 559, 560, 637, n. (*m*); see also *Osbaldeston* v. *Askew,* 1 Russ. 160; *Minton* v. *Kirwood,* L. R. 1 Eq. 449, 455, 3 Ch. 614.

(*s*) Cf. above, p. 1029.

(*t*) See above, p. 1068.

(*u*) *Mullings* v. *Trinder,* L. R. 10 Eq. 449, 454; and see *Rose* v. *Calland,* 5 Ves. 186. This rule applies equally where there have been previous conflicting decisions of Courts of co-ordinate jurisdiction; *Re Carter and Kenderdine's contract,* 1897, 1 Ch. 776, 778.

(*x*) *Beioley* v. *Carter,* L. R. 4 Ch. 230, 236, 240; *Alexander* v. *Mills,* L. R. 6 Ch. 124, 132; *Radford* v. *Willis,* L. R. 7 Ch. 7; *Collier* v. *Walters,* L. R. 17 Eq. 252, 260; *Osborne to Rowlett,* 13 Ch. D. 774, 781; *Re Carter and Kenderdine's contract,* 1897, 1 Ch. 776. In earlier cases it had been held that the Court would not enforce specific performance, notwithstanding that its opinion was in favour of the title, if it considered that that opinion might fairly and reasonably be questioned by competent persons; *Marlow* v. *Smith,* 2 P. W. 198, 201; *Price* v. *Strange,* 6 Madd. 159, 164; *Pyrke* v. *Waddingham,* 10 Hare, 1, 7, 8; *Collier* v. *McBean,* L. R. 1 Ch. 81, 84; *Hamilton* v. *Buckmaster,* L. R. 3 Eq. 323, 328; Fry, Sp. Perf. § 884, 3rd ed.

Title depending on the construction of an ill-drawn instrument.

Title depending on a question of general law.

Title depending on some general rule of construction.

Title depending on the construction of a general statute.

Again, the Court will not oblige a purchaser to take a title depending on the construction and legal operation of some ill-expressed and inartificial instrument, if the Court consider that its own view of the question is open to reasonable doubt in some other Court (*y*). But if the title depend on a question of the general law of the land, the Court will, as a rule, decide the question and, if its opinion be in favour of the title, order the specific performance of the contract by the purchaser (*z*). And this rule applies also where the question, though one of construction, turns upon a general rule of construction, unaffected by any special context in the instrument (*a*). It has been held that, where the title depends on the construction of some general statute, the true construction thereof may, owing either to the absence of any decision or to the conflict of previous decisions, be regarded by the Court as a question sufficiently doubtful to justify the Court in not enforcing the contract specifically as against the purchaser (*b*). But the latest expression of judicial opinion in the Court of Appeal is that in this case also a Superior Court will follow the modern general rule, and will decide the question of construction; and, if necessary, oblige the purchaser to take the title accordingly (*c*).

Questions of fact.

Title depending on a presumption of fact.

With respect to questions of fact:—The Court may consider the title too doubtful where it depends on the establishment by oral evidence of facts of a complicated nature (*d*); especially where the witnesses necessary to repel an adverse claim may be dead or difficult to find when the claim is asserted (*e*). And where the title depends on a presumption of fact, it is considered to be too doubtful if it would be the duty of a judge charging a jury upon the evidence offered, not to direct them that they were bound to find in favour of the presumption, but to leave

(*y*) James, L. J., *Alexander* v. *Mills*, L. R. 6 Ch. 124, 132; see *Re Nichols and Von Joel's contract*, 1910, 1 Ch. 43.

(*z*) James, L. J., *Alexander* v. *Mills*, L. R. 6 Ch. 124, 132; *Forster* v. *Abraham*, L. R. 17 Eq. 351, 354; *Osborne to Rowlett*, 13 Ch. D. 774; *Re Carter and Kenderdine's contract*, 1897, 1 Ch. 776.

(*a*) *Radford* v. *Willis*, L. R. 7 Ch. 7, 11.

(*b*) C. A., *Palmer* v. *Locke*, 18 Ch. D. 381, 388; *Re Thackwray and Young's contract*, 40 Ch. D. 34, 38, 39.

(*c*) *Mogridge* v. *Clapp*, 1892, 3 Ch. 382, 396, 401; *Re Carter and Kenderdine's contract*, 1897, 1 Ch. 776; Cozens-Hardy, L. J., *Re Handman and Wilcox's contract*, 1902, 1 Ch. 599, 609; see also *Wentworth* v. *Humphrey*, 11 App. Cas. 619, 622, 625, 626.

(*d*) *Re Douglas and Powell's contract*, 1902, 2 Ch. 296, 314.

(*e*) Fry, Sp. Perf. § 890 (i), 3rd ed.

them to draw their own conclusion from the evidence (*f*). This principle is illustrated where a title depends upon some fact of a negative nature, which is not capable of positive proof, but is really a matter of inference only (*g*). Thus we have seen that a purchaser will not be forced to accept a title depending on the fact that the vendor had no notice of some equitable incumbrance (*h*). Other examples of the application of this rule are where the fact to be established is that there was no creditor capable of taking advantage of an act of bankruptcy by the vendor (*i*), or that a voluntary settlement was not avoided under the old law by a subsequent conveyance for value (*k*). But where the title depends on a fact, which is capable of positive proof and is satisfactorily proved (*l*), or where it depends on a presumption of fact, and a judge would be bound to direct a jury to find in favour of the presumption, the purchaser will be obliged to perform the contract specifically (*m*). The Court may consider the title too doubtful, where the facts stated in support of it raise the presumption (though not an irrebuttable presumption) that it is invalid in some respect; as that an appointment abstracted was a fraud upon the power (*n*). On the other hand, where the facts neither amount to proof nor raise any presumption of the invalidity of the title, but merely give ground for a *suspicion* of fraud or other like defect, which might render the title invalid in equity, and a good title to the legal estate is shown on the face of the abstract (*o*), the Court will not absolve the purchaser from the obligation of performing the contract specifically (*p*). It should be noted, however, that if the facts stated raise a suspicion of

Where the facts raise a presumption of the invalidity of the title.

Mere suspicion of an equitable defect.

Suspicion of a fact affecting the title at law.

(*f*) Above, pp. 122, and n. (*k*), 142.
(*g*) Above, p. 121.
(*h*) Above, pp. 123, 183, 472.
(*i*) *Lowes* v. *Lush*, 14 Ves. 547.
(*k*) Above, pp. 121, 376, 378.
(*l*) *Smith* v. *Death*, 5 Madd. 371, 374; and see *Spencer* v. *Topham*, 22 Beav. 573 (above, pp. 973, 974); *Re Bridges and McRae's contract*. 30 W. R. 539; *Games* v. *Bonnor*, 54 L. J. Ch. 517, 33 W. R. 64; Kekewich, J., *Mogridge* v. *Clapp*, 1892, 3 Ch. 382, 392, 393.
(*m*) Above, p. 122; *Re Summerson*, 1900, 1 Ch. 112, n.; *Hepworth* v. *Pickles*, ib. 108; see also *Clippens Oil Co.* v. *Edinburgh, &c. Trustees*, 1904, A. C. 64, 69, 70.
(*n*) *Warde* v. *Dixon*, 28 L. J. N. S. Ch. 315, 321; Fry, Sp. Perf. § 890 (vi), 3rd ed.; see above, pp. 279, 970, n. (*b*).
(*o*) See above, pp. 227, 279, 970, n. (*b*).
(*p*) *M'Queen* v. *Farquhar*, 11 Ves. 467; *Green* v. *Pulsford*, 2 Beav. 70; and see *Cockcroft* v. *Sutcliffe*, 25 L. J. Ch. 313, 2 Jur. N. S. 323; *Re Huish's Charity*, L. R. 10 Eq. 5, 10; *Alexander* v. *Mills*, L. R. 6 Ch. 124, 132; Sug. V. & P. 393, 779.

some defect in the title *at law*, the purchaser will have no protection in case the suspicion be well-founded (*q*). The law applicable to these circumstances appears to be this:—On the one hand, the Court will never presume fraud (*r*); the presumption is that everything has been rightly done (*s*); and the vendor is entitled to the benefit of this rule, and cannot be called upon to give evidence to disprove any mere suggestion by the purchaser of some hypothetical fact, which would adversely affect the title (*t*). But against this, it appears that where there is a real ground of suspicion of some matter which would cause a defect in the *legal* title to the property sold, the Court may, unless the suspicion be removed by sufficient evidence, pronounce the title to be too doubtful to be forced on the purchaser, or may at least do so if its acceptance would leave him exposed to the reasonable probability of adverse litigation (*u*).

Effect of judgment for specific performance in barring action on the contract at law.

The effect of a judgment for specific performance, or of the dismissal of an action for specific performance, upon the right to recover damages at law for breach of the contract has been already considered (*x*); and the question has been particularly

(*q*) Above, pp. 125, 313, and n. (*f*), 894, 895, 970, 971.

(*r*) Alderson, B., *Cattell* v. *Corrall*, 4 Y. & C. Ex. 228, 236; *Vatcher* v. *Paull*, 1915, A. C. 372, 382; Williams on Commons, 3.

(*s*) Above, p. 108; *Clippens Oil Co.* v. *Edinburgh, &c. Trustees*, 1904, A. C. 64, 69; *Heath* v. *Deane*, 1905, 2 Ch. 86, 93.

(*t*) Sug. V. & P. 392.

(*u*) See *Hartley* v. *Smith*, Buck, 368, 380; *Cattell* v. *Corrall*, 4 Y. & C. Ex. 228, 237; and consider *Grove* v. *Bastard*, 2 Ph. 619, 1 De G., M. & G. 69, where the undue influence alleged would have rendered the will invalid at law. It is respectfully submitted that Sir Edward Fry, in his statement of the law (Sp. Perf. §§ 891 (vi.), 892, 893, 3rd ed.), does not lay sufficient stress on the distinction pointed out by Leach, V.-C., in *Hartley* v. *Smith*, ubi sup., between the suspicion of a defect affecting only the equitable title (where the purchaser, if attacked, could shield himself by the plea of purchaser for value of the legal estate without notice of the defect) and a suspicion, for which there is apparently reasonable ground, that the facts are in truth such as would avoid *at law* some assurance stated as part of the title.

(*x*) Above, pp. 1034-1038. It may also be noted that judgment for specific performance *against* either party to the contract will preclude him from successfully suing for damages at law; for, as a general rule, the judgment could not have been pronounced if the other party had committed a breach of contract (above, p. 1054), so *that* question is concluded between them. And in the cases where a man may obtain an order for specific performance, notwithstanding that he has broken the contract at law (above, pp. 1052, 1053), the other party would, under the old practice, have been restrained from suing on the con-

discussed of the vendor's right to damages, where his action for specific performance is dismissed because the Court considers the title too doubtful (*y*).

Certificate against the title in vendor's action.

In a vendor's action for specific performance, if upon the inquiry into title the certificate be against the title (*z*), there has, of course, been such a breach of the contract as justifies the purchaser in rescinding it (*a*); and the defendant may consequently claim, in the vendor's action, to have an order for repayment of his deposit, with interest thereon, and establishing his lien on the land sold for the deposit and interest and his expenses of investigating the title (*b*).

Specific performance at suit of the purchaser.

If the *purchaser* of land sue for the specific performance of the contract, he is, as we have seen (*c*), entitled to an inquiry as to the title; but he takes this inquiry at his own risk. For if he be aware of objections to the title, and upon the inquiry the vendor fail to prove a good title according to the contract (which is all that he can be called upon to show), the purchaser must either waive his objections to the title, and pay the costs of the inquiry into title, or else he must submit to have his action for specific performance dismissed without costs (*d*). If he accept the latter alternative, he will not be precluded from suing at law for damages for the vendor's breach of contract, but he will be unable to recover from the vendor, as damages, his own costs of his action for specific performance (*e*). So also, if the vendor had disclosed such a title as the purchaser was bound to accept, and the purchaser subsequently sued for specific performance and claimed an inquiry into title, the purchaser would have to pay the costs of the inquiry. And if, in such case, the purchaser had raised objections to the title, which the Court would not uphold, and he had no other cause

tract at law; so that he has now no right to bring such an action; *Levy* v. *Lindo*, 3 Mer. 81; *Reynolds* v. *Nelson*, 6 Madd. 290; *Beaufort* v. *Glynn*, 3 Sm. & G. 213, 226; and see *Garbutt* v. *Fawcus*, 1 Ch. D. 155; *Wright* v. *Redgrave*, 11 Ch. D. 24.

(*y*) Above, pp. 1037, 1038.

(*z*) Above, p. 1067, and n. (*e*).

(*a*) Above, pp. 1000, 1001, 1012.

(*b*) *Kitton* v. *Hewett*, 1904, W. N. 21; and see *Re Furneaux and Aird's contract*, 1906, W. N. 215; above, pp. 1012-1014.

(*c*) Above, p. 1067.

(*d*) Above, p. 83.

(*e*) Above, pp. 83, n. (*d*), 1034, 1036.

of complaint than the vendor's refusal to admit these objections, the purchaser would have to pay the vendor's costs of the action (*f*). The difference between the purchaser's position in proceedings for specific performance brought against him by the vendor, and that which he occupies in case he bring such an action himself, is a matter of the greatest importance to a conveyancer advising the purchaser on title. We have seen that in many cases a purchaser may resist specific performance at the vendor's suit unless the vendor produce a better title than he has contracted to show; whilst if, in the same circumstances, the purchaser seek actively to enforce his own right to specific performance of the contract, he will be obliged to accept such a title as, according to the construction placed on the agreement in a Court of *law*, the vendor has stipulated that he will provide (*g*).

Specific performance with compensation.

The cases, in which the vendor or purchaser is entitled to obtain an order for specific performance of the contract with compensation for some error of description, have been already discussed in connection with the subject of the completion of the contract (*h*).

Failure to comply with a judgment for specific performance.

Proceedings to enforce the judgment.

If either party to a sale of land fail to comply with an order of the Court that he shall perform the contract specifically (*i*), the other may at his election adopt one of two courses (*k*). First, he may apply to the Court to enforce the judgment. That is to say, he may obtain an order fixing a time and place for conveyance and payment of the purchase money, or fixing a time within which the judgment for specific performance is to be obeyed, and in default of compliance with this order he may proceed against the disobedient party for contempt (*l*).

Vesting order.

And if the party in default be the vendor, the purchaser may obtain a conveyance of the land to himself by means of a vesting

(*f*) See *Lyle* v. *Yarborough*, John. 70; *Phillipson* v. *Gibbon*, L. R. 6 Ch. 428, 434.

(*g*) Above, pp. 37, 83, 181-184, 189-192, 194, 195, 758, 760, 765, 808.

(*h*) Above, pp. 676-684.

(*i*) Above, p. 1051.

(*k*) Fry, Sp. Perf. §§ 1171-1173, 3rd ed.; Seton on Judgments, 2215. 7th ed.

(*l*) Seton on Judgments, 2215-2217, 7th ed. The order for payment is a final judgment on which a bankruptcy notice may be founded; *Re A Debtor* (No. 837 of 1912), 3 K. B. 242.

order or an order appointing a person to convey under the Trustee Act, 1893 (*m*). Secondly, in case of failure to comply within a reasonable time with a judgment for specific performance, or to comply with an order fixing a time for completion, the party not in default may obtain an order for the rescission of the contract, and if he be the vendor, for forfeiture of the deposit as well (*n*). Besides these remedies, if the purchaser were the party in default, the vendor may apply to the Court to enforce his lien for the unpaid purchase money (*o*) and to obtain an order for a re-sale by the Court to realise the amount due thereon (*p*), or for liberty to exercise an express power of re-sale reserved to him by the contract (*q*).

Order for rescission of the contract.

Enforcing the vendor's lien.

The County Courts have jurisdiction in actions for the specific performance of any agreement for the sale or purchase of any property, where the purchase money does not exceed the sum of 500*l.* (*r*). It has been held that this jurisdiction exists

Jurisdiction of County Courts in specific performance.

(*m*) Stat. 56 & 57 Vict. c. 53, ss. 26-34; above, p. 510, n. (*z*); Seton on Judgments, 2217, 2218, 7th ed.; and see stat. 47 & 48 Vict. c. 61, s 14.

(*n*) *Hall* v. *Burnell*, 1911, 2 Ch. 551; *Holford* v. *Trim*, 1921, W. N. 243; above, pp. 1012, n. (*m*), 1016, n. (*f*), 1035, n. (*d*). This case appears to form an exception to the rule that an election once exercised to affirm or rescind a contract cannot afterwards be revoked (above, pp. 810, 966; for by obtaining judgment for specific performance of the agreement the party had previously affirmed it; above, pp. 1011, 1034, 1035; see *Baker* v. *Williams*, 62 L. J. Ch. 315. It is thought that the ground of this exception is that, if one party commit a contempt of Court in disobeying an order that he shall perform the contract specifically, this is such an absolute repudiation of his duty under the contract that it would be a hardship to oblige the other to carry out the agreement and not to allow him to recede from it. The writer has followed Sir Edward Fry's statement (above, p. 1074, n. (*k*)), that in the above-mentioned circumstances rescission may be claimed by either party to the contract; but he has not found any reported case in which the contract has been rescinded on the purchaser's application. But if the principle above suggested be correct, the purchaser should be equally entitled to the relief of rescission in case the vendor refuse to convey. Apart from statute, which now enables the purchaser to obtain a vesting order, the purchaser would have had no remedy to obtain a conveyance if the vendor did not choose to be coerced by the processes of attachment or sequestration; and in that case it would be obviously inequitable to hold him to the contract.

(*o*) Above, pp. 481, 990.

(*p*) Above, pp. 49, n. (*h*), 995, 1021, 1022; Seton on Judgments, 2221, 7th ed.

(*q*) *Shuttleworth* v. *Clews*, 1910, 1 Ch. 176; see above, pp. 1019, 1020, and n. (*e*).

(*r*) Stat. 51 & 52 Vict. c. 43, s. 67 (4).

where the contract is for the sale of an equity of redemption for a price not exceeding 500*l.*, although the amount of the price, together with that of the charges on the property, exceed that sum (*s*).

§ 4.—*Of a Vendor and Purchaser Summons.*

Vendor and Purchaser summons.

At the present time, when a vendor and purchaser of land are at variance upon some matter, which prevents the completion of the contract, and neither of them will give way, they usually prefer to submit the point at issue to the Court in a Vendor and Purchaser summons (*t*); and if the question between them can be decided in such proceedings, it appears that this is the proper course to take (*u*). Vendor and Purchaser summonses owe their origin to the Vendor and Purchaser Act, 1874 (*x*), which enacted that a vendor or purchaser of real or leasehold estate in England, or their representatives respectively, may at any time or times and from time to time apply in a summary way to a judge of the Court of Chancery in England in chambers, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract), and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

Parties are in the same position as on a reference as to title in an action for specific performance.

Whatever could be done in chambers upon a reference as to title under a decree for specific performance, when the contract was established (*y*), can be done upon proceedings under this enactment. It enables the parties to put themselves in chambers in exactly the same position in which they would have been, with all the rights which they would have had, under the old form of decree. Evidence by affidavit may therefore be given, and the deponents may be cross-examined (*z*).

(*s*) *R.* v. *Judge Whitehorne,* 1904, 1 K. B. 827.

(*t*) Above, pp. 37, 1011.

(*u*) See *King* v. *Chamberlayn,* 1887, W. N. 158, 159.

(*x*) Stat. 37 & 38 Vict. c. 78, s. 9, also providing for similar applications to a judge of the Court of Chancery in Ireland.

(*y*) Above, p. 1067, and n. (*e*).

(*z*) *Re Burroughs, Lynn and Sexton,* 5 Ch. D. 601.

Questions proper to be decided in a V. & P. summons.

The principal questions proper to be decided in a Vendor and Purchaser summons are questions of the construction of the contract (*a*), questions as to the sufficiency of the vendor's title (*b*), and questions as to conveyance and the form of the conveyance (*c*) and the adjustment of accounts in view of the completion of the contract (*d*). In fact, as a general rule, all questions may be so decided which may arise between a vendor and purchaser on the assumption that there is an unimpeachable contract of sale existing between them, and which must be cleared up before the parties can proceed to completion.

Questions affecting the validity or existence of the contract.

It will be observed that the Court has no jurisdiction to decide in a Vendor and Purchaser summons any question affecting the existence or validity of the contract. If, therefore, the contention of either party be that no contract was ever formed, or that the contract is not enforceable (as for non-compliance with the Statute of Frauds (*e*)), or that it is void for mistake or illegality, or voidable for misrepresentation, fraudulent or innocent (*f*), for duress or undue influence, or by reason of any relative equitable disability (*g*), the dispute cannot be settled in a Vendor and Purchaser summons, but the party, who insists on his rights, must assert them by action. It is held, however, that if the controversy between the parties include any question which may properly be determined on a Vendor and Purchaser summons and would require to be settled in case the contract were valid, the Court may decide it in such proceedings, notwithstanding that the validity of the contract (as in case of an alleged misrepresentation) be also disputed (*h*).

Court may decide any question proper to be dealt with, though the validity of the contract be also disputed.

(*a*) See *Re Hughes and Ashley's contract,* 1900, 2 Ch. 595.
(*b*) See cases cited above, pp. 1012, 1013, n. (*q*).
(*c*) See above, pp. 150, 170, 601, n. (*o*), 602, n. (*v*).
(*d*) Above, pp. 667 *sq.*
(*e*) Above, pp. 3-10.
(*f*) *Re Davis and Cavey,* 49 Ch. D. 601, 607-609; *Re Hughes and Ashley's contract,* 1900, 2 Ch. 595, 602, 604; above, pp. 190, 810, n. (*z*).
(*g*) Above, p. 1039.
(*h*) *Re Hughes and Ashley's contract,* 1900, 2 Ch. 595. In *Re Lander and Bagley's contract,* 1892, 3 Ch. 41, it was decided, on the ground that any question of the construction of the contract may properly be determined in a V. & P. summons, that under a contract to grant a lease, not particularly specifying from what day the term was to run, it was intended that the term was to commence on a particular day, notwithstanding that one of the parties raised the contention that the omission to name the day rendered the contract void for uncertainty. This seems to be an extreme instance of the exercise of the jurisdiction.

We may also note that, as the Act particularly confers jurisdiction to determine claims for compensation, the Court may decide on summons any question respecting that particular form of misrepresentation which consists in failure to show title to the whole property described in the contract, and which is properly the failure to deliver the entire article contracted for (*i*).

Objections to specific performance which would be no defence at law.

The excluded questions affecting the existence or validity of the contract (*k*) appear to be such contentions as put in issue the existence or validity of the contract *at law;* and it appears that, as the contractors are in the same position in a Vendor and Purchaser summons as if they were parties to an action for specific performance of their agreement (*l*), they are not precluded from raising in such a summons any objection to carrying out the contract, which would be a good ground of defence to an action for specific performance, but not to an action for breach of the contract at law (*m*). For example, either party may so raise any objection to the performance of the contract on the ground of unfairness, including such innocent misrepresentation or such non-disclosure of some matter of title as would *not* avail to set aside the contract at law (*n*). It appears too that an objection to perform the contract specifically on the ground of mistake, coupled with hardship (*o*), might well be raised in a Vendor and Purchaser summons, especially as it would probably involve the resistance of a claim for compensation (*p*). And the defence that the title is too doubtful to force upon an unwilling purchaser may be raised in such proceedings (*q*). Here it may be remarked that in a

The parties' position varies

(*i*) See *Re Terry and White's contract,* 32 Ch. D. 14; *Re Fawcett and Holmes,* 42 Ch. D. 150; *Re Hare and O'More's contract,* 1901, 1 Ch. 93; *Re Puckett and Smith's contract,* 1902, 2 Ch. 258; above, pp. 675-684, 809.

(*k*) Above, pp. 1076, 1077.

(*l*) Above, p. 1076.

(*m*) See above, pp. 1059 *sq.*

(*n*) *Re Marsh and Earl Granville,* 24 Ch. D. 11; *Re Davis and Cavey,* 40 Ch. D. 601; *Re National Provincial Bank of England and Marsh,* 1895, 1 Ch. 190; *Re Haedicke and Lipski's contract,* 1901, 2 Ch. 666 (*sed quære,* whether in this case the learned judge was right in ordering the return of the deposit); see above, pp. 37, 69, 70, 100, 101, 183, 184, 189-194, 758, and n. (*m*), 759, 760, 808.

(*o*) Above, pp. 677, 679, 764, 765; see also *Wood* v. *Scarth,* 2 K. & J. 33; *Rudd* v. *Lascelles,* 1900, 1 Ch. 815, 820.

(*p*) Above, p. 1076.

(*q*) *Re New Land Development Association and Gray,* 1892, 2 Ch. 138; *Re Hollis' Hospital and Hague,* 1899, 2 Ch. 540; *Re Handman and Wilcox's contract,* 1902, 1 Ch. 599.

Vendor and Purchaser summons the position of each party, as regards the specific performance of the contract, is determined, not by the incident of his having taken out or being a respondent to the summons, but by the contention, which he raises therein. Thus we have seen (*r*) that a purchaser insisting as plaintiff on the specific performance of the contract must accept such title as the vendor has contracted or is able to give; although if the purchaser were the defendant, he might be able to require a better title as the condition of the vendor's enforcing specific performance against him. There may be the same difference in the purchaser's position in a Vendor and Purchaser summons according as he contends that the vendor shall carry out the contract, or that he himself is not liable to perform it specifically. But he may himself take out a Vendor and Purchaser summons to establish the latter contention (*s*).

according to the contention raised by either.

If the controversy be whether the contract has been discharged or not (*t*), it appears that, in general, this cannot be determined in a Vendor and Purchaser summons; for such a contention puts in issue the very existence of the contract, and the question would, in general, be one of controverted fact (*u*). It has been held, however, that the Court has jurisdiction so to determine the question, whether a power contained in the contract for either party to rescind it (such as the common power for the vendor to rescind on an unwelcome requisition (*x*)), has been well exercised (*y*). This was so decided on the ground that the Vendor and Purchaser Act only excluded the consideration of questions of the *initial* existence or validity of the contract, and did not prohibit the Court from pronouncing on the true construction of a power to rescind, which was an express term of the agreement itself (*z*). The construction of any clause contained in the contract may certainly be determined in a

Questions of the discharge of the contract.

Discharge by exercise of an express power of rescission.

(*r*) Above, pp. 83, 1073, 1074.

(*s*) *Re Davis and Cavey,* 40 Ch. D. 601; *Re Scott and Alvarez's contract,* 1895, 1 Ch. 596; *Re Hollis' Hospital and Hague,* 1899, 2 Ch. 540; *Re Handman and Wilcox's contract,* 1902, 1 Ch. 599; above, pp. 190-192, 637, n. (*m*).

(*t*) Above, p. 1039.

(*u*) See *Re Popple and Barratt,* 25 W. R. 248.

(*x*) Above, pp. 171-176, 982.

(*y*) This point is established by numerous decisions besides that cited in the next note; see cases cited above, pp. 171-176.

(*z*) *Re Jackson and Woodburn's contract,* 37 Ch. D. 44.

Vendor and Purchaser summons (*a*); but it is submitted that the excluded questions are not only those relating to the *initial* validity or existence of the contract. And it is thought that if either party contend that the contract has been discharged by mutual assent (*b*), otherwise than under an express power of rescission, and the other party dispute this, the controversy could only be determined by the Court in an action. As to discharge for impossibility of performance (*c*), it appears that the Court might in a Vendor and Purchaser summons determine whether, upon the true construction of the contract, the sale were made subject to such a condition as would, in case of the impossibility of its fulfilment, cause the parties to be discharged from their agreement (*d*). But if this were decided in the affirmative, it is thought that the question, whether the parties were in fact so discharged, could only be tried in an action. It is also submitted that an action is the proper proceeding for the trial of disputed questions of fact, as to whether the contract has been discharged by bankruptcy (*e*) or by performance (*f*), or whether the right of action arising from a breach of the contract has been discharged by any means (*g*), or barred by any Statute of Limitations (*h*).

Discharge for impossibility of performance.

Order for rescission of the contract and consequential relief.

It has been decided that on a Vendor and Purchaser summons the Court may not only answer any question properly submitted to it, but may also direct such things to be done as would be the natural consequence of the Court's decision. If, therefore, a purchaser of land take out a summons claiming that his requisitions have not been sufficiently answered and that a good title has not been shown, and the Court uphold his contention (so that he would be entitled to rescind the contract, or to claim damages for its breach (*i*)), the Court has jurisdiction in the summons to make an order rescinding the contract and to order the vendor to return the deposit with interest, and to pay the purchaser's costs of investigating the title (*k*). And

(*a*) Above, p. 1077.
(*b*) Above, pp. 975 *sq.*
(*c*) Above, pp. 983 *sq.*
(*d*) Above, p. 985.
(*e*) Above, pp. 987, 988.
(*f*) Above, p. 988.
(*g*) Above, pp. 1004-1006.
(*h*) Above, p. 1007.
(*i*) Above, pp. 1001, 1011.
(*k*) *Re Higgins and Hitchman's contract,* 21 Ch. D. 95; *Re Hargreaves and Thompson's contract,* 32 Ch. D. 454; *Re Bryant and Barningham's contract,* 44 Ch. D. 218, 222; *Re Marshall and Salt's contract,* 1900, 2 Ch. 202, 206; *Re Hare and O'More's contract,* 1901, 1 Ch. 93, 96.

it has been further held that, if a vendor take out a summons, claiming that he has shown a good title, and the Court decide that he has not, the purchaser may in the same proceeding obtain an order for the rescission of the contract, repayment of the deposit with interest, and payment of his costs of investigating title (*l*). But it is considered that this jurisdiction does not go beyond authorising an order for payment to the purchaser of such expenses as he could recover at law, either in the event of his rescinding the contract (*m*), or as damages according to the rule in *Flureau* v. *Thornhill* (*n*); and that if the purchaser claim substantial damages, as for a wilful breach of the vendor's duty to convey the land (*o*), he must assert his rights by action (*p*). It is a question whether the Court has jurisdiction on a Vendor and Purchaser summons, where an order is made at the purchaser's instance for the rescission of the contract, to make a further order establishing the purchaser's lien for the deposit and interest and his expenses of investigating title (*q*). It is laid down in the judgments of Pearson, J., in *Re Yeilding and Westbrook* (*r*), and Chitty, J., in *Re New Land Development Association and Gray* (*s*), that the purchaser is entitled to such an order; but in the former case the order was not in fact made (*t*), and in the latter the order made was affirmed on different grounds and the point was not dealt with in the Court of Appeal. An order charging the vendor's interest was made in the Irish case of *Re Priestley and Davidson* (*u*); but in England it has not been the general practice for purchasers to claim or for the Court to make such an order (*x*); and it does not appear that this question has ever been discussed in the Court of Appeal. An order of this kind was, however, made by Kekewich, J., in *Re Furneaux and*

Whether an order can be made giving effect to the purchaser's lien.

(*l*) *Re Higgins and Percival*, 59 L. T. 213; *Re Walker and Oakshott's contract*, 1901, 2 Ch. 383.

(*m*) Above, pp. 1012-1014.

(*n*) 2 W. Black. 1078; above, p. 1027.

(*o*) See above, pp. 1028, 1029, 1033.

(*p*) *Re Hargreaves and Thompson's contract*, 32 Ch. D. 454, 457, 459; *Re Wilsons and Stevens' contract*, 1894, 3 Ch. 546.

(*q*) Above, p. 1013.

(*r*) 31 Ch. D. 344, 345.

(*s*) 1892, 2 Ch. 138, 146.

(*t*) Seton on Judgments, 2200, 7th ed.

(*u*) 31 L. R. Ir. 122.

(*x*) See cases cited above, p. 1080, n. (*k*); Seton on Judgments, 2198, 2199, 7th ed.

Aird's contract (*y*). It may be remarked that the purchaser's right to a lien in case of his rescission of the contract is clearly established (*z*); and it seems to be just as much a necessary consequence of the rescission (*a*) as his right to recover the deposit, with interest, and his costs of investigating title from the vendor personally. The point, therefore, seems to fall within the principle on which the jurisdiction was established to make an order on summons against the vendor personally for payment of these items (*b*).

Position of the parties as to repayment of the deposit.

We have already pointed out (*c*) the curious consequences arising from the fact that whilst the applicant and respondent in a Vendor and Purchaser summons are in the position of parties to an action for specific performance as regards the determination of the particular question raised (*d*), they are in the position of parties to an action at law with respect to any consequential order for the repayment of the deposit.

Course to be taken on non-compliance with an order made in a V. & P. summons.

It has been held that when a party to the contract has obtained in a Vendor and Purchaser summons an order in his favour, and the other party makes default in compliance therewith, the proper course for the former to take is to apply to the Court for the enforcement of the order, and not to bring an action for specific performance of the contract or for damages (*e*). Of course, any *order* made in a Vendor and Purchaser summons, that either party shall do some act or pay some money, may be enforced by appropriate process of execution (*f*). We may observe, however, that although the Court may make a declaration on such a summons that the vendor has sufficiently answered the purchaser's requisitions, and can make a good title to the property sold, it does not appear that the Court has ever made an order in these proceedings that the contract shall be specifically performed (*g*). And in default

Where a declaration only is made.

(*y*) 1906, W. N. 215.
(*z*) Above, p. 1014.
(*a*) See above, pp. 1080, 1081.
(*b*) Above, p. 1081.
(*c*) Above, pp. 37, 38, 189 *sq.*
(*d*) Above, p. 1076.
(*e*) *Thompson* v. *Ringer*, 29 W. R. 520, 1881, W. N. 48.
(*f*) R. S. C. 1883, Ord. XLII. rr. 3, 7, 24; Seton on Judgments, 408 *sq.*, 7th ed.
(*g*) See Seton on Judgments, 2197 *sq.*, 7th ed.; and see above, p. 1081. And see the observations of Kekewich, J., in *Re Wallis and*

of any such order it is difficult to see what process of execution could issue to coerce a party who acted in disregard, not exactly of a declaration made against him, but merely of the logical effect of such a declaration. In one celebrated case, in which the Court of Appeal had made such a declaration on a Vendor and Purchaser summons, and the purchaser declined, on the ground of objections subsequently discovered, to complete the contract, the vendor brought an action for specific performance of the contract; and it does not appear that the propriety of this course was questioned (*h*). In that case the purchaser counter-claimed, by leave of the Court, to review the previous decision in the matter, on the ground that it was obtained in ignorance of material facts, which were then unknown to him and which he had subsequently discovered, but could not, with reasonable diligence, have discovered any earlier; and in the event he was enabled to avoid specific performance of the contract. If, however, the purchaser had had no such ground of defence it does not appear that the vendor could have taken any other proceedings than an action for specific performance, in order to enforce compliance with the logical result of the declaration that he had shown a good title.

Contract to grant a lease.

Voluntary gift.

An application by way of Vendor and Purchaser summons may be made in case of a contract to grant a lease of land (*i*), as well as of a sale of leaseholds (*k*). But such proceedings are not applicable to a voluntary gift of or a gratuitous promise to convey land. They may, however, be taken in the case of a contract for a nominal consideration (*l*).

Form of application.

Applications under the Vendor and Purchaser Act, 1874 (*m*), are made by summons intituled in the matter of the agreement and in the matter of the Act. The title of the summons

Barnard's contract, 1899, 2 Ch. 515, 519-521, on the propriety of determining in a V. & P. summons the general question whether a good title has or has not been shown. The practice of so doing has, however, the sanction of the Court of Appeal; *Re Burroughs, Lynn and Sexton,* 5 Ch. D. 601; *Re Hargreaves and Thompson's contract,* 32 Ch. D. 454.

(*h*) *Re Scott and Alvarez's contract,* 1895, 1 Ch. 596, 610, 1895, 2 Ch. 603; above, pp. 191, 192.

(*i*) *Re Lander and Bagley's contract,* 1892, 3 Ch. 41.

(*k*) See above, p. 90, n. (*m*).

(*l*) *Re Marquis of Salisbury,* 23 W. R. 824.

(*m*) Above, pp. 1076, 1077.

should state shortly the date of the contract, the parties thereto, and the particulars of the property comprised therein (*n*). The summons may, if the judge thinks fit, be adjourned from chambers into Court and *vice versâ* (*o*). Except in simple cases, such summonses usually are adjourned into Court.

Appeals from orders on V. & P. summons.

Appeals from any order made in a Vendor and Purchaser summons must, except by special leave of the Court of Appeal, be brought within fourteen days. This period is to be calculated, in the case of an appeal from an order made in chambers, from the time when the order was pronounced or when the appellant first had notice thereof, and in all other cases from the time at which the order is signed, entered, or otherwise perfected; or, in the case of the refusal of an application, from the date of such refusal (*p*). Fourteen days' notice of appeal must be given (*q*). It is thought that orders so made are in general final and not interlocutory orders; so that, under the Judicature Act, 1894 (*r*), leave to appeal therefrom is not necessary. Such orders certainly appear to dispose finally of the rights of the parties (which is the characteristic quality of a final order (*s*)) in every case where a general declaration is made in favour of or against the title (*t*), or where an order for the rescission of the contract is made (*u*), or where the logical result of the judgment given in the summons is to settle the question whether an action for specific performance or damages could be successfully maintained. As we have seen, a judgment of this kind appears to debar the parties from raising any question thereby determined in a subsequent action on the contract (*x*).

(*n*) Seton on Judgments, 2200, 7th ed.; Daniell's Chancery Forms, 1210, 6th ed.

(*o*) R. S. C. Ord. LIV. r. 9.

(*p*) R. S. C. Ord. LVIII. rr. 9, 15; *Re Blyth and Young*, 13 Ch. D. 416; *Re Ricketts and Avent's contract*, 1890, W. N. 16; *Re Walker and Oakshott's contract*, 1902, W. N. 147.

(*q*) R. S. C. Ord. LVIII. r. 3.

(*r*) Stat. 57 & 58 Vict. c. 16, s. 1.

(*s*) *Re Stockton Iron Furnace Co.*, 10 Ch. D. 335, 345; *Bozson* v. *Altrincham Urban Council*, 1903, 1 K. B. 547, 548.

(*t*) Above, pp. 1077, 1082, and n. (*g*).

(*u*) Above, p. 1080.

(*x*) Above, p. 1083. And note that, even where an action for specific performance may be necessary to give effect to a declaration made in a V. & P. summons, the question already determined in the summons cannot be reopened except on a counter-claim by way of an action for review.

§ 5.—*Of the Purchaser's Remedies for Disturbance after Completion.*

Purchaser's remedies in case of the discovery after completion of a defect of title.

If after completion of the contract the purchaser discover that he has obtained a defective title to the land sold, so that he is liable to be ejected therefrom or disturbed in his enjoyment thereof by some stranger to the contract of sale, we have seen (*y*) that his only remedies are, (1) to bring an action of deceit or for rescission of the contract, if the vendor have been guilty of *fraudulent* misrepresentation (*z*); (2) to sue for compensation if the contract contained an express agreement for compensation so worded as to be applicable to the case (*a*); (3) to sue for damages if the vendor have given an express warranty of his ownership of or right to sell the land (*b*); (4) to sue for rescission of the contract and the return of the purchase money, if the agreement of sale were entered into under a mistake, common to both parties, as to some fact which was a condition precedent to their contracting (*c*); (5) to sue upon the vendor's covenants for title (if any) contained in the conveyance (*d*); and (6) to sue upon any other covenants for title of which the benefit runs with the land sold, and has so devolved upon the purchaser (*e*).

Of these remedies, the first three have been already sufficiently examined (*f*). But the reader may be reminded that the common form of express agreement to make compensation for errors of description is not applicable where the whole property described in the conveyance has been assured by the conveyance, but the purchaser has been subsequently ejected from a part of it owing to a defect in the vendor's title (*g*). And an express agreement in the contract of sale to make compensation for any defect in the vendor's title would be a very unusual stipulation; it would also be an express warranty of the vendor's ownership. Still, such stipulations may possibly be made.

(*y*) Above, pp. 575, 613, 614, 798, 997, 998, 1012.
(*z*) Above, pp. 575, 613, 614, 798 *sq.*
(*a*) Above, pp. 575, 682-684.
(*b*) Above, pp. 575, 613, 614, 794, 798, 801.
(*c*) Above, pp. 766-768.
(*d*) Above, pp. 612 *sq.*
(*e*) Above, pp. 618-620.
(*f*) See notes (*z*), (*a*), (*b*), above.
(*g*) *Debenham* v. *Sawbridge*, 1001, 2 Ch. 98; above, p. 682.

Where the contract was made under a common mistake as to the vendor's title.

The fourth remedy above mentioned has also been considered in the chapter on Mistake (*h*). But we may add here that it appears that, if the parties to a sale of land had agreed thereto on the express understanding that the vendor was full owner of the land sold (the vendor believing this to be true), so that the fact of the vendor's ownership was a condition precedent to their uniting in the formation of the contract, and it were found out after completion that the vendor and purchaser were both mistaken in this assumption, the vendor's title being wholly or partially defective, then the purchaser would be entitled to rescind the contract and recover the price paid (*i*). Thus, in *Cripps* v. *Reade* (*i*), a vendor of leaseholds had acquired the term by succession from a person, whom he believed to be the lawful administrator of a former owner. The vendor told the purchaser that the premises were his right and property to do what he liked with, and if anything happened he would see the purchaser righted. Whereupon the purchaser paid the price and took possession, the lease being handed over to him, but no conveyance executed. It turned out that the administrator through whom the plaintiff claimed was not a lawful administrator. A rightful administrator was appointed, and recovered the premises by ejectment. The purchaser then sued the vendor to recover the price as money had and received to the purchaser's use. It was contended that the only action (if any) that could be maintained was upon the special warranty of the vendor's ownership (*k*). But it was considered that the parties had contracted on the express assumption that the vendor was the rightful owner of the term; and it was held that, as this was a mistake, the money had been paid under a mistake of fact and was recoverable accordingly (*l*). No doubt in this case no conveyance had been executed; but we have seen that where the contract has been entered into under a common mistake of fact, it may be rescinded after completion (*m*). It should be

Cripps v. *Reade*.

(*h*) Above, pp. 766-768.

(*i*) 6 T. R. 606.

(*k*) No doubt in this case there was an express warranty of the vendor's ownership, and this would have enabled the purchaser to recover the price, as damages, although he had taken a conveyance of the land sold; above, p. 1085, n. (*b*). But the action brought was not in form an action on such warranty.

(*l*) Above, p. 819, n. (*c*). And that a mistake or representation as to a matter of private right (as that A. is the owner of Blackacre) is a mistake or representation of fact, see above, pp. 768, 801.

(*m*) Above, p. 766.

observed that contracts for the sale of land made in the ordinary form, where the purchaser trusts for his security to his own investigation of the title shown, are not entered into upon the express condition that the vendor is the owner of the whole estate sold; and no such condition is implied therein (*n*).

Remedy on covenants for title.

Let us now turn our attention to the purchaser's remedies on covenants for title. We have seen (*o*) that these may be either aginst the vendor himself on the covenants for title contained or implied by statute (*p*) in the conveyance, or against some predecessor in title of the vendor's on covenants, which were given by him and of which the benefit has devolved on the purchaser along with the land conveyed to him. In either case the covenants may have been in common or the statutory form, or they may have been made in special terms conferring a larger or a more restricted guarantee of indemnity than is usually given (*q*). The effect of covenants of the latter kind, of course, depends on the particular terms in which they are expressed (*r*). Covenants for title in common or statutory form (that is to say, the usual covenants for right to convey, quiet enjoyment, freedom from incumbrances, and further assurance, or that a lease is valid (*s*)), are either absolute or qualified; absolute covenants for title being given upon a mortgage (*t*),

(*n*) See *Bree* v. *Holbech*, 2 Doug. 654; and other cases cited above, pp. 614, n. (*r*), 798, n. (*g*), 997, n. (*q*); *Clare* v. *Lamb*, L. R. 10 C. P. 334.

(*o*) Above, pp. 997, 1011.

(*p*) Above, pp. 612, 617, 620.

(*q*) See above, pp. 612 *sq.*, 617, 623; Davidson, Prec. Conv. vol. 2, pt. 1, pp. 379 and n., 381, 4th ed.

(*r*) Thus covenants against the acts of all persons claiming or *pretending to claim* any right are broken by a wrongful eviction; *Chaplain* v. *Southgate*, 10 Mod. 384; Sug. V. & P. 600. Covenants limited to *lawful* disturbance by specified persons are broken by entry under a claim, though unfounded, of right, but not by wrongful acts not done under any assertion of title; *Lloyd* v. *Tomkies*, 1 T. R. 671; Sug. V. & P. 600. Covenants against a man's *defaults* give a wider remedy than those concerning only his acts, omissions and sufferances; Sug. V. & P. 602, 603; 2 Dart, V. & P. 785, 5th ed.; 885, 6th ed.; 793, 794, 7th ed. And see Sug. V. & P. 599-604, 610-615; 2 Dart, V. & P. 783 *sq.*, 5th ed.; 883 *sq.*, 6th ed.; 791 *sq.*, 7th ed. As to questions, to what extent covenants for title, not made in common form, are limited by restrictive expressions used therein, see Sug. V. & P. 605 *sq.*; 2 Dart, V. & P. 789, 5th ed.; 889, 6th ed.; 798, 7th ed.

(*s*) Above, pp. 612, 617.

(*t*) Davidson, Prec. Conv., vol. 1, p. 121, 4th ed., 97, 5th ed.; vol. 2, pt. 2, p. 110, 4th ed.; Wms. Real Prop. 667, 23rd ed.; above, p. 617, n. (*q*).

but not usually on any other occasion, and qualified covenants being generally entered into upon a sale, and being then so restricted as to avail only against a defect of title arising from the acts, omissions, or sufferances of the vendor himself and any of his predecessors in title subsequent to the last previous conveyance of the land for valuable consideration other than marriage (*u*). As a rule, the purchaser's only remedy against his own vendor is on the usual vendor's qualified covenants for title; and his remedy against any previous vendor will generally be of the same kind. Covenants for title running with the land may, however, include some previous mortgagor's absolute covenants for title; this will be so when the land has been sold under the mortgagee's power of sale or foreclosed (*x*). But we have seen (*y*) that when lands are sold by a mortgagor and conveyed with the concurrence of the mortgagee, the vendor's qualified covenants for title then usually given by the mortgagor to the purchaser appear to supersede and to deprive him of the benefit of the absolute covenants contained in the mortgage deed.

Absolute covenants for title avail only against rightful claims.

Absolute covenants for title are not restricted in terms so as to avail only against the acts, &c. of any particular persons (*z*); they are applicable in case of any defect of title arising from any adverse estate, interest or claim outstanding in any person or persons whomsoever. They are, however, limited by judicial construction to *lawful* eviction or disturbance by any person; that is to say, they only guarantee indemnity against adverse claims which are rightful (*a*). If a purchaser be wrongfully ejected from or disturbed in his

(*u*) This is the qualification of the statutory covenants implied by conveying as beneficial owner upon a sale. Vendor's express covenants for title in the old common form were limited to the acts, &c. of the vendor himself and his predecessors in title subsequent to the last previous sale or other conveyance for value whereon proper covenants for title were given; above, pp. 612, 617, 621. For the common and the statutory forms of covenants for title entered into upon a sale, see Davidson, Prec. Conv. vol. 2, pt. 1, pp. 232, 237, 4th ed.; stat. 44 & 45 Vict. c. 41, s. 7 (1 A., B.); Wms. Real Prop. 674, 682, 23rd ed.

(*x*) Davidson, Prec. Conv. vol. 1, p. 121, 4th ed.; vol. 2, pt. 2, p. 110, 4th ed.

(*y*) Above, p. 615.

(*z*) Davidson, Prec. Conv. vol. 2, pt. 2, pp. 110, 314, 4th ed.; stat. 44 & 45 Vict. c. 41, s. 7 (1 C.).

(*a*) *Dudley* v. *Folliott*, 3 T. R. 584; Sug. V. & P. 600.

enjoyment of the land sold after completion of the sale, he must pursue the proper legal remedies against the wrongdoer, and cannot successfully seek indemnity under any absolute covenants for title in common form, of which he is entitled to the benefit. But the usual qualified covenants for title have a different effect; they apply in terms to all acts, &c. of the particular persons specified therein. If, therefore, any of these persons wrongfully evict or disturb the purchaser, the latter may take action under the covenants for quiet enjoyment undisturbed by the wrongdoer's acts, incumbrances or claims (*b*).

Qualified covenants against all acts, lawful or unlawful, of the persons specified.

One most important consequence of the regular limitation of a vendor's covenants for title (*c*) is that, if the purchaser be ejected or disturbed, after the land has been conveyed to him, by some person rightfully claiming by title paramount to that of the vendor and of those against whose acts, &c. the vendor has covenanted, the purchaser has no cause of action upon the covenants (*d*). Nor has he in such case any right or equity to recover the purchase money, if fully paid (*e*), or to resist payment of any part thereof which may remain due to the vendor (*f*). But, of course, absolute covenants for title extend

Purchaser's eviction by title paramount.

(*b*) *Foster* v. *Mapes,* Cro. Eliz. 212, 213; *Nash* v. *Palmer,* 5 M. & S. 574; *Fowle* v. *Welsh,* 1 B. & C. 29; Sug. V. & P. 600.

(*c*) Above, pp. 612, 617.

(*d*) Above, p. 608; and see *Thackeray* v. *Wood,* 5 B. & S. 325, 6 B. & S. 766.

(*e*) *Maynard's case,* 2 Freem. 1, 3 Swanst. 651; *Thomas* v. *Powell,* 2 Cox, 394; *Urmston* v. *Pate,* 4 Cruise Dig. 390, cited *Wakeman* v. *Rutland,* 3 Ves. 233, 235; *Tylee* v. *Webb,* 14 Beav. 14, 17; and see cases cited above, p. 1087, n. (*n*).

(*f*) Above, p. 997. Here it may be noted that if, *before* the conveyance has been fully executed, either the vendor, or the purchaser having been let into possession, be ejected by any one claiming under a title paramount to the vendor's, the purchaser can recover any purchase money already paid by him and resist payment of any part of the price that remains unpaid, notwithstanding that he had accepted the title, and that under the vendor's covenants for title he would have had no guarantee of indemnity against the ejector's rights; *Cripps* v. *Reade,* 6 T. R. 606 (as to which, see above, p. 1086); *Johnson* v. *Johnson,* 3 B. & P. 162; Sug. V. & P. 549. The reason of this is that the lawful ejectment of the vendor, or of the purchaser holding possession with the vendor's assent, before completion, makes it impossible for the vendor duly to fulfil the agreement by conveying the land *with the right to possession.* The vendor, therefore, is obliged to commit such a breach of the contract as entitles the purchaser to rescind it and to recover all sums paid on account of the price; see above, pp. 546, 574, 575, 1000, 1001, 1011-1013. If, however, the purchaser had agreed to buy such interest or title as the vendor had (see above, pp. 187, 607), he would be bound to perform the contract,

to the case of any lawful (*g*) eviction by title paramount to the vendor's.

Covenant for right to convey, when broken.

The usual covenant for right to convey is broken if by reason of any act, omission or sufferance on the part of any person, whose acts, &c. are convenanted against, the conveying party or parties had not, at the time of the execution of the conveyance, such right as enabled him or them to make a valid assurance of the land in the manner expressed in the deed (*h*). And it appears, according to the balance of authority, that a breach of this covenant caused by the absence of the right contracted for is entire and complete at the time of the execution of the conveyance, so that the Statute of Limitations will begin to run in the covenantor's favour as from that date (*i*), notwithstanding that the covenantee be ignorant of the breach (*k*). If, however, the breach of covenant were fraudulently concealed by the covenantor, it appears that according to the present law the statute will not begin to run until the time when the fraud was or might with reasonable diligence have been discovered (*l*). In all these respects, a covenant for the validity of a lease and the ordinary trustee's or mortgagee's covenant against incumbrances (*m*) appear to stand on the same footing as the covenant for right to convey (*n*).

Examples of a breach of the usual

It is a breach of the usual vendor's qualified covenant for right to convey if the land assured remain subject to any out-

and could not recover any purchase money paid or resist payment of the price, although the vendor, or he himself having been let into possession, were ejected by title paramount before the contract had been completed by conveyance: *Early* v. *Garret*, 9 B. & C. 928; and see *Best* v. *Hamand*, 12 Ch. D. 1; above, p. 189. As to the purchaser's duty in such a case to perform the contract specifically, see *Kenney* v. *Wexham*, 6 Madd. 355; *Wilkinson* v. *Torkington*, 2 Y. & C. Ex. 726; Fry, Sp. Perf. §§ 914-921, 3rd ed.

(*g*) Above, p. 1088.

(*h*) *Bradshaw's case*, 9 Rep. 60b; *S. C., nom. Salmon* v. *Bradshaw*, Cro. Jac. 304; *Kingdon* v. *Nottle*, 1 M. & S. 355, 365; Sug. V. & P. 610; *Spoor* v. *Green*, L. R. 9 Ex. 99, 109, 110, 116; *David* v. *Sabin*, 1893, 1 Ch. 523; *Turner* v. *Moon*, 1901, 2 Ch. 825.

(*i*) *Turner* v. *Moon*, 1901, 2 Ch. 825, adopting the judgment of Bramwell, B., in preference to that of Kelly, C. B., in *Spoor* v. *Green*, L. R. 9 Ex. 99; 2 Dart, V. & P. 781, 5th ed.; 881, 6th ed.; 788, 7th ed.

(*k*) *Short* v. *M'Carthy*, 3 B. & A. 626; *Howell* v. *Young*, 5 B. & C. 259.

(*l*) *Gibbs* v. *Guild*, 9 Q. B. D. 59.

(*m*) Above, pp. 612, 617, 618.

(*n*) 2 Dart, V. & P. 781, 5th ed.; 881, 6th ed.; 789, 7th ed.

vendor's qualified covenant for right to convey.

standing estate, interest, mortgage, charge or claim, whether at law or in equity (*o*), to which the conveyance was not expressly made subject, and which was created or caused by any act, omission, or sufferance of any person comprehended in the covenant (*p*). This is the case if the vendor, or any of his predecessors in title specified in the covenant, had been bankrupt before the conveyance, and the estate sold remained in the trustee in the bankruptcy (*q*); or if the vendor or any such predecessor as aforesaid had created any mortgage or lease of the land sold, and the same had not been completely got in or extinguished before or by the conveyance (*r*); or if the vendor sold as devisee of the entire fee simple, but in truth took a life estate only under the will (*s*); or if the vendor or any such predecessor had previously sold and conveyed away a part of the land which he purported to assure (*t*), or had granted rights of way or any other easement over the land (*u*); or if the vendor selling as tenant in fee had previously made a settlement of the land, under which he was entitled for his own life only (*v*); or if the vendor or any such predecessor had allowed a stranger to acquire by adverse possession under the Statute of Limitations a title to part of the land purported to be conveyed (*x*). The covenant is also broken if the vendor or any party concurring by his direction in the conveyance were under any legal incapacity (as infancy, coverture, &c. (*y*)) which prevented the conveyance from taking valid effect as expressed (*z*). It should be particularly observed that if the vendor or any other person whose acts, &c. are covenanted against, made a prior conveyance of any kind and the whole estate or interest then conveyed have not been got in before or by the assurance to the purchaser, the defect of title is owing to the act of the

(*o*) See above, p. 1038, n. (*d*).
(*p*) See *Spoor* v. *Green*, L. R. 9 Ex. 99, 110, 116; *David* v. *Sabin*, 1893, 1 Ch. 523; *Turner* v. *Moon*, 1901, 2 Ch. 825; *Eastwood* v. *Ashton*, 1915, A. C. 900, 908, 913, 918, 921.
(*q*) *Jenkins* v. *Jones*, 9 Q. B. D. 128.
(*r*) *David* v. *Sabin*, 1893, 1 Ch. 523.
(*s*) *Page* v. *Midland Ry. Co.*, 1894, 1 Ch. 11.
(*t*) *May* v. *Platt*, 1900, 1 Ch. 616.
(*u*) *Turner* v. *Moon*, 1901, 2 Ch. 825; *Great Western Ry. Co.* v. *Fisher*, 1905, 1 Ch. 316.
(*v*) *Lock* v. *Furze*, L. R. 1 C. P. 441, 443.
(*x*) *Eastwood* v. *Ashton*, 1915, A. C. 900.
(*y*) Above, pp. 845 *sq.*
(*z*) *Nash* v. *Aston*, T. Jones, 195; Sug. V. & P. 601.

David v. *Sabin.*

person who made the prior conveyance, notwithstanding that the outstanding estate or interest were not created by him, but were made without his knowledge by some person claiming under the prior conveyance. Thus, in *David* v. *Sabin* (*a*), A. granted a lease of land to B. for ninety-nine years, and B. mortgaged the land by demise. B. then surrendered the term to A. for valuable consideration, without disclosing to him the existence of the mortgage. Afterwards A. sold and conveyed the land to B. in fee, entering into the statutory covenants for title; and B. mortgaged the land to X. in fee, and then X. and B. together sold and conveyed the land to C. B.'s mortgagee by demise having subsequently established his charge on the land in an action against C., C. sued A. on the statutory covenants for title implied in A.'s conveyance to B. And it was held by the Court of Appeal, reversing the decision of Romer, J., that, as the granting of the lease was the act of A., he had committed a breach of his covenant for right to convey, and it was immaterial that the actual outstanding interest, viz., B.'s underlease by way of mortgage, was made by B. without A.'s knowledge. And it was further decided that the mortgage was an incumbrance made by a person claiming under A., and the establishment of the charge by action was the act of a person claiming under A.; so that A. had also committed a breach of his covenants for quiet enjoyment and freedom from incumbrances. The Court also held that, as the defect of title was referable to the act of A. in originally granting the lease, he was not exonerated from liability under the covenants by the fact that he took back the surrendered term as a purchaser for valuable consideration. For the mortgage sub-term remained unaffected by the surrender; and A. did not then purchase the mortgagee's interest, or obtain any title thereto. Finally, it was considered that B.'s fraud in concealing his mortgage from A. could not be pleaded as a defence to C.'s action on the covenants (*b*).

As judicial decisions upon the construction of covenants for title are not of very common occurrence (*c*), a further illustra-

(*a*) 1893, 1 Ch. 523.
(*b*) As to this point, see below, p. 1108.
(*c*) But in America it is different and the reports there contain numerous decisions on the subject of covenants for title; see Rawle, Covenants for Title, 5th ed. (1887).

tion may be given. The facts are taken, with some alteration, from a case on which the writer was instructed to advise. A. sold land to B. The land was subject, together with other lands of large value, to a mortgage in fee created by a person, under whom A. claimed by settlement, and the title to the mortgage was satisfactorily deduced down to C. The purchase was completed, C. receiving the whole purchase money by A.'s direction, and the land being conveyed by C. as mortgagee and by A. as beneficial owner to B. in fee simple. Afterwards B. was informed by C.'s solicitors that, *owing to the appointment of a new trustee,* the mortgage had been transferred, subsequently to the settlement of the draft conveyance, to C. and D.; and that this circumstance had been overlooked in executing the conveyance. It was obvious that C. had committed a breach of the statutory covenant against incumbrances: but it further appeared, according to the rule in *David* v. *Sabin* (*d*), that A. had committed a breach of his covenant for right to convey. For one half of the mortgagee's legal estate remained outstanding in D., and the mortgage having been created by a person, against whose acts A. had covenanted, it appeared that A. was liable under the covenant, notwithstanding that he was entirely innocent of the immediate cause of the defect of title, that is to say, of C.'s conveyance of the mortgage estate to himself jointly with D. We may also remark that, owing to the form in which the information was conveyed to B., it appeared that he was affected with notice that C. was a trustee —a fact which had of course been carefully kept off the abstract (*e*). D. was willing to confirm the sale, but as B. found that he had paid the purchase money to one of two trustees, who had no power (unless specially authorised) to give a good discharge therefor, he was obliged to make requisitions for the production of the title of the beneficial owners of the mortgage money, in order to satisfy himself that the mortgage was an authorised investment of the trust money, and that C. and D. were duly appointed trustees, who could give him a good discharge for his payment (*f*).

Nature of the usual qualified covenants

The usual vendor's qualified covenants for quiet enjoyment and freedom from incumbrances are for quiet enjoyment, un-

(*d*) Above, p. 1092.
(*e*) Above, p. 224, n. (*b*).
(*f*) Above, pp. 227, 228.

for quiet enjoyment and freedom from incumbrances.

disturbed by and free from all estates, incumbrances, and claims created or caused by any person or persons whose acts are covenanted against (*g*), *or any person claiming under or in trust for him or them* (*h*). And it is important to mark that the regular covenant for freedom from incumbrances is, *not* that the lands conveyed *are* free from incumbrances, but that they shall be quietly enjoyed free from the incumbrances specified (*i*). It follows that if land be conveyed which is subject to some outstanding incumbrance not expressly mentioned in the conveyance but comprehended in the covenants for title (as in *David* v. *Sabin* (*j*)), no breach of the vendor's covenant against incumbrances is committed by the mere fact of conveyance. It is not until the purchaser is disturbed in his quiet enjoyment of the premises by reason of the incumbrance that a breach of that covenant arises (*k*). As the covenants for quiet enjoyment and freedom from incumbrances are not broken until the quiet enjoyment promised is disturbed, the Statute of Limitations does not begin to run against the covenantee until that event has happened, and then runs only in respect of the particular breach so occasioned (*l*). It appears that any outstanding estate, charge, or claim which would amount to a breach of the vendor's usual qualified covenant for right to convey (*m*) will be sufficient, so soon as the purchaser is disturbed by virtue thereof in his quiet enjoyment of the land sold, to cause a breach of the usual covenant against incumbrances. And of course in such case the disturbance of the purchaser's quiet enjoyment will in itself be a breach of the covenant for quiet enjoyment, apart from the covenant against incumbrances (*n*).

Breach thereof, when committed.

Persons claiming under the covenantor.

A covenant for quiet enjoyment, undisturbed by any person *claiming under* the covenantor, is broken by the entry, not only

(*g*) Above, pp. 1087, 1088, and n. (*u*).

(*h*) Davidson, Prec. Conv. vol. 2, pt. 1, p. 232, 4th ed.; stat. 44 & 45 Vict. c. 41, s. 7 (1 A); *David* v. *Sabin*, 1893, 1 Ch. 523, 532; above, p. 1092.

(*i*) Sug. V. & P. 610; *Nottidge* v. *Dering*, 1909, 2 Ch. 647, 656, affirmed, 1910, 1 Ch. 297.

(*j*) Above, p. 1092.

(*k*) *Vane* v. *Barnard*, Gilb. Eq. 6, 7; Sug. V. & P. 610; *Nottidge* v. *Dering*, 1909, 2 Ch. 647, 656, affirmed, 1910, 1 Ch. 297.

(*l*) 2 Dart, V. & P. 781, 5th ed.; 881, 6th ed.; 788, 7th ed.

(*m*) Above, p. 1091.

(*n*) See above, p. 1092.

of any person who has succeeded to the whole or any part of the covenantor's estate, whether after his death or by conveyance *inter vivos*, but also of any person who but for the covenantor's act would have had no title to the land (*o*). Thus a disturbance by the covenantor's heir or devisee, by his widow entitled to dower (*p*), or her husband to curtesy, or by any one claiming under a prior conveyance by the covenantor on sale, mortgage, or settlement (*q*), would be a breach of the covenant; and so would an entry by a person deriving title under a prior appointment by the covenantor under any power given to him either alone or jointly with any other person (*r*). And where a term of years had been created and mortgaged with the covenantor's concurrence under a power exercisable by trustees with his consent, the mortgagee was held to be a person claiming under the covenantor (*s*). Where a lessee was disturbed by a distress for arrears of land tax accrued due before the lease was made, it was considered that this was a disturbance by a person claiming against and not under the lessor, and was no breach of the lessor's express covenant for quiet enjoyment, undisturbed by the lessor himself or any one claiming under him (*t*). But if a vendor give the statutory covenants for freedom from incumbrances made, occasioned, or *suffered* by himself, he will be liable thereunder in case the property sold remain subject, after the conveyance to the purchaser, to any charge thereon which the vendor was bound, but has omitted, to clear off before completion of the sale (*u*).

Disturbance by one claiming under a person, whose acts are covenanted against.

Although the usual qualified covenant for quiet enjoyment will be broken by any disturbance, lawful or unlawful, on the part of some person whose acts are particularly covenanted against (*x*), a disturbance by any one *claiming under* such person will not cause any breach unless it be done under a claim of right derived from such person. The covenantor is not

(*o*) *Hurd* v. *Fletcher*, Doug. 43; *Evans* v. *Vaughan*, 4 B. & C. 261, 267; *Carpenter* v. *Parker*, 3 C. B. N. S. 206; *Calvert* v. *Sebright*, 15 Beav. 156, 160.
(*p*) *Anon.*, Godbolt, 333.
(*q*) *Evans* v. *Vaughan*, 4 B. & C. 261.
(*r*) *Hurd* v. *Fletcher*, Doug. 43; *Calvert* v. *Sebright*, 15 Beav. 156.
(*s*) *Carpenter* v. *Parker*, 3 C. B. N. S. 206.
(*t*) *Stanley* v. *Hayes*, 3 Q. B. 105; Sug. V. & P. 603; 2 Dart, V. & P. 884.
(*u*) *Stock* v. *Meakin*, 1900, 1 Ch. 683, 694; above, pp. 497, 498.
(*x*) Above, p. 1089.

answerable for the purely wrongful acts of those claiming under the persons against whose acts, &c. he has promised to indemnify the covenantee (*y*).

What is a breach of a covenant for quiet enjoyment.

In order to establish a breach of a covenant for quiet enjoyment, or for quiet enjoyment free from incumbrances, it is necessary to prove that the plaintiff has been actually disturbed in his possession or enjoyment of the premises, as by his ejectment therefrom, or by entry thereon or user thereof contrary to his right (*z*), or by blocking up a private way which gives access thereto (*a*), or by notice to his tenants to pay rent to an adverse claimant (*b*). And the disturbance complained of must have been either the direct act of some person comprehended in the covenant or else a consequence, which he foresaw or ought reasonably to have foreseen, of some act of his (*c*). If an adverse claimant take proceedings against the purchaser at law or in equity to establish his right, that appears to be a disturbance of the purchaser's quiet enjoyment (*d*). But where, after completion of a sale of land, a decree was made by the Court of Chancery establishing a right of common thereover, and the purchaser was no *party* to the suit, though he was one of a class of persons who were represented therein, it was considered that this alone was no breach of the vendor's covenant for quiet enjoyment: but it was admitted that the decision would have been different if the decree had been made against the purchaser personally (*e*). A simple assertion of an adverse claim, though reiterated to an extent which may cause mental annoyance, and mere threats of legal proceedings, however disturbing to the threatened party's peace of mind, do not appear to be any breach of a covenant for his quiet enjoyment of some land assured to him (*f*).

(*y*) *Sanderson* v. *Mayor of Berwick-on-Tweed,* 13 Q. B. D. 547; *Harrison* v. *Muncaster,* 1891, 2 Q. B. 680, 683, 685; *Williams* v. *Gabriel,* 1906, 1 K. B. 155.

(*z*) Shepp. Touch. 170; *Howard* v. *Maitland,* 11 Q. B. D. 695; and see *Carpenter* v. *Parker,* 3 C. B. N. S. 206.

(*a*) *Andrews* v. *Paradise,* 8 Mod. 318; *Morris* v. *Edgington,* 3 Taunt. 24.

(*b*) *Edge* v. *Boileau,* 16 Q. B. D. 117.

(*c*) *Harrison* v. *Muncaster,* 1891, 2 Q. B. 680; *Williams* v. *Gabriel,* 1906, 1 K. B. 155; see also *Markham* v. *Paget,* 1908, 1 Ch. 697.

(*d*) See *Hunt* v. *Danvers,* T. Raym. 370; *Howard* v. *Maitland,* 11 Q. B. D. 695, 700; *David* v. *Sabin,* above, p. 1092.

(*e*) *Howard* v. *Maitland,* ubi sup.

(*f*) See *Witchcot* v. *Nine,* 1 Brownlow & Goldsborough, 81; *Car-*

Whether acts not affecting the title or possession can be a breach of a covenant for quiet enjoyment.

It is a question, upon which conflicting opinions have been judicially expressed, whether a covenant for quiet enjoyment can be broken by any act which does not affect the title to the land or directly infringe upon the covenantee's possession (*g*). But it is established that a covenant for quiet enjoyment does not enlarge the grant in any way; so that if one sell and convey land, giving the usual covenants for title, and afterwards acquire some adjoining land, he is not liable to be restricted in his lawful user of the after-acquired land by the fact that such user may cause inconvenience to his grantee (*h*). Thus he may well build thereon so as to obstruct the access of light to his grantee's windows, if the grantee had not previously acquired any easement of light (*i*). So, also, he may build thereon a tall chimney or a high wall, notwithstanding that the effect of this is to cause his grantee's chimneys to smoke (*k*). And in neither case will he commit any breach of his covenant for quiet enjoyment (*k*). And the better opinion appears to be that, even where the vendor is possessed, at the time of conveyance, of land adjoining the land sold, no breach of his covenant for quiet enjoyment is committed by any act done on the adjoining land, which does not affect the title to the land sold or any easement conveyed therewith (*l*), or directly infringe upon the purchaser's possession (*m*), or derogate from the grant (*n*), but

penter v. *Parker*, 3 C. B. N. S. 206; *Howard* v. *Maitland*, 11 Q. B. D. 695, 703; *Edge* v. *Boileau*, 16 Q. B. D. 117, 120.

(*g*) See *Morgan* v. *Hunt*, 2 Ventr. 213; *Dennett* v. *Atherton*, L. R. 7 Q. B. 316, 326, 327; *Sanderson* v. *Mayor of Berwick-on-Tweed*, 13 Q. B. D. 547, 551; *Harrison* v. *Muncaster*, 1891, 2 Q. B. 680, 684, 689; *Aldin* v. *Latimer Clark, Muirhead & Co.*, 1894, 2 Ch. 437, 444; *Manchester, Sheffield and Lincoln Ry. Co.* v. *Anderson*, 1898, 2 Ch. 394, 401; *Tebb* v. *Cave*, 1900, 1 Ch. 642; *Davis* v. *Town Properties Investment Corpn.*, 1903, 1 Ch. 797, 804, 805; *Browne* v. *Flower*, 1911, 1 Ch. 219, 228; *Jones* v. *Consolidated Anthracite Collieries, Ld.*, 1916, 1 K. B. 123, 136, 137.

(*h*) *Davis* v. *Town Properties Investment Co.*, 1903, 1 Ch. 797; *Nottidge* v. *Dering*, 1910, 1 Ch. 297, 307.

(*i*) *Booth* v. *Alcock*, L. R. 8 Ch. 663.

(*k*) See note (*h*), above.

(*l*) See above, p. 604; and as to nuisance by noise, see *Jenkins* v. *Jackson*, 40 Ch. D. 71, 75, 76, or temporary annoyance, *Phelps* v. *City of London Corp.*, 1916, 2 Ch. 255, 267.

(*m*) See *Sanderson* v. *Mayor of Berwick-on-Tweed*, 13 Q. B. D. 547, where the plaintiff held land under a lease from the defendant, who had covenanted for quiet enjoyment; and the lawful user by

(*n*) See *Aldin* v. *Latimer Clark, Muirhead & Co.*, 1894, 2 Ch. 437; *Grosvenor Hotel Co.* v. *Hamilton*, 1894, 2 Q. B. 836; *Markham* v. *Paget*, 1908, 1 Ch. 697; *Harmer* v. *Jumbil, &c., Ld.*, 1921, 1 Ch. 200; cf. *Malzy* v. *Eichholz*, 1916, 2 K. B. 308.

only inflicts by indirect means some inconvenience to the purchaser, not amounting to an independent cause of action (*o*).

Tebb v. *Cave.*

It is true that in one case, where a man possessed of a house and an adjoining plot of land leased the house, with the usual covenant for quiet enjoyment, and afterwards erected on the adjoining land buildings of such a height as to cause the chimneys of the house to smoke, it was held that he had committed a breach of his covenant for quiet enjoyment (*p*). But the correctness of this decision has been questioned in the Court of Appeal (*q*); and their opinion was treated as a binding authority by Eve, J., in a subsequent case (*r*).

Covenant for further assurance.

The usual covenant for further assurance is, in effect, for the assurance at any future time to the purchaser, at his own request and cost, of any outstanding estate or interest, to which the conveyance is not made subject, which is necessary to be got in before the conveyance can take effect as intended (*s*), and which is vested in the vendor, or in any other person by, through, under or in trust for the vendor, or by, through or under any one else, against whose acts, &c. the vendor has covenanted (*t*). It is therefore a breach of this covenant if the vendor, or any other person, in whom any such estate or interest is so vested, refuse to assure the same to the purchaser

another lessee from the defendant of land adjoining the plaintiff's caused a flow of water into the plaintiff's land; and this was considered to be a direct interference with the plaintiff's enjoyment, and to be a breach of the covenant for quiet enjoyment. But it seems questionable whether the facts of the case justified this decision; for the defendant's lessee was entitled to drain his land through a system of drainage passing under the plaintiff's land, and the damage complained of arose because a drain pipe situate within the *plaintiff's* land was out of repair, and so allowed the water to escape. It is submitted that the true question to have been considered was, whether the defendant was bound to keep this pipe in repair, or had warranted it to be fit for its purpose; see above, p. 754, and n. (*q*). It appears, too, that the principle asserted in that case is open to question; see authorities cited above, p. 1097, n. (*g*); and see *Harrison* v. *Muncaster,* 1891, 2 Q. B. 680; *Jones* v. *Consolidated Anthracite Collieries, Ld.*, 1916, 1 K. B. 123, 136, 137.

(*o*) See *Robinson* v. *Kilvert,* 41 Ch. D. 88; *Harrison* v. *Muncaster,* 1891, 2 Q. B. 680; *Davis* v. *Town Properties Investment Corpn., Ltd.*, 1903, 1 Ch. 797, 804, 805; *Browne* v. *Flower,* 1911, 1 Ch. 219, 224-228.

(*p*) *Tebb* v. *Cave,* 1900, 1 Ch. 642.

(*q*) See note (*h*), above, p. 1097.

(*r*) *Harmer* v. *Jumbil* (*Nigeria*) *Tin Areas, Ld.*, 1921, 1 Ch. 200, 213.

(*s*) See *King* v. *Jones,* 5 Taunt. 418, 427; *Davis* v. *Tollemache,* 2 Jur. N. S. 1181, 1185; *Re Jones,* 1893, 2 Ch. 461, 471.

(*t*) See above, **pp. 1087, 1088, and n. (*u*).**

on being requested to do so. And it is to be observed that the words of the covenant, providing that the further assurance shall be made at the covenantee's cost, refer only to the expense of conveyance. If any outstanding estate or interest comprehended in the covenant should have been conveyed to the person, in whom it is vested, for valuable consideration, the covenantee is not bound to offer to buy it in or tender compensation, but the simple refusal to convey will cause the covenant to be broken (*u*). The vendor is bound under this covenant to assure to the purchaser any such estate or interest as aforesaid, vested in himself or any one in trust for him, whether it belonged to him at the date of the execution of the conveyance, or were afterwards acquired by him, even for valuable consideration (*v*). To this extent, the purchaser may oblige the vendor to perform the covenant specifically (*x*). And of course any one, who might succeed to the vendor's said estate or any part of it by act of law, gratuitous conveyance, purchase with notice of the covenant, or purchase of a merely equitable interest, would be equally liable so to carry out the vendor's agreement (*y*). But if any person, who claims or might claim under the vendor or under any one else comprehended in the vendor's covenants for title, should, subsequently to the conveyance to the purchaser, acquire by some independent title an interest in the land, it does not appear that his refusal to assure that interest would be a breach of the covenant for further assurance; the terms of which extend only to estates or interests vested in such a person by title derived from the vendor himself, or his predecessors mentioned in the covenant. Thus, if the vendor, being entitled only to the residue of a long term, had purported to sell and convey the fee, and were afterwards to acquire by descent, devise, or purchase for value, the entire freehold reversion, he would be bound under his covenant for further assurance to convey the same to the purchaser; and so would his heirs, trustee in bankruptcy, and gratuitous or equitable assignees. But if the freehold reversion were to be acquired by the vendor's eldest son under an independent title, not transmitted to him from his father, he would not then be bound to assure the same to the

(*u*) *Re Jones*, 1893, 2 Ch. 461, 471.
(*v*) *Taylor* v. *Debar*, 1 Ch. Ca. 274, 2 Ch. Ca. 212; Sug. V. & P. 612.
(*x*) Sug. V. & P. 612.
(*y*) Above, pp. 502, 503, 535.

purchaser; nor would the vendor's covenant for further assurance be broken by his refusal to do so.

Covenant for further assurance does not enlarge the grant, unless such were the intention.

Davis v. *Tollemache.*

It appears that a covenant for further assurance, like a covenant for quiet enjoyment (*z*), will not be construed so as to enlarge the grant, unless the parties' intention appear to be that the grant shall be supplemented by the subsequent assurance of some estate or interest not purported to be comprised therein. Thus, where a tenant in tail in remainder had by deed *unenrolled* mortgaged his own estate and interest in the land and covenanted for further assurance, it was considered that he was not bound under the covenant to execute a disentailing deed (*a*). And if one sell and convey any other particular estate which he has in land, or such estate or interest as he has therein, covenanting for further assurance in the usual form, and afterwards acquire some other estate or interest therein, it appears that he will not be bound to convey this to the purchaser (*b*). On the other hand, where a tenant in tail has assumed to sell and convey the entire fee simple, he will be bound under his covenant for further assurance to bar the entail; and his trustee in bankruptcy will be equally liable so to give effect to the covenant (*c*). And where a tenant in tail in remainder had converted his estate into a base fee, and had then sold and conveyed all his estate and interest in the land to a purchaser in fee, covenanting to execute every such *disentailing* or other assurance as might be required for more perfectly assuring the premises to the purchaser, his heirs and assigns, he was obliged to perform his covenant, when the remainder fell into possession, by executing a further disentailing assurance to the purchaser's use, so as to vest in him the entire fee simple (*d*).

Bankes v. *Small.*

Acts which may be required under a covenant for further assurance.

It appears that, under a covenant for further assurance, the covenantor may be required to execute a duplicate of the conveyance, if the original have been casually destroyed (*e*) or

(*z*) Above, p. 1097.
(*a*) *Davis* v. *Tollemache,* 2 Jur. N. S. 1181; see above, p. 506, n. (*t*).
(*b*) See *Smith* v. *Osborne,* 6 H. L. C. 375, 390-392, 395, 398.
(*c*) *Pye* v. *Daubuz,* 3 Bro. C. C. 595; *Ex parte Fripp,* De G. 293; see above, p. 506, n. (*t*).
(*d*) *Bankes* v. *Small,* 34 Ch. D. 415, 36 Ch. D. 716.
(*e*) *Bennett* v. *Ingoldsby,* Finch, 262; 2 Dart, V. & P. 888.

handed over to a sub-purchaser of part of the lands sold (*f*); but in such case the assurance executed should be indorsed as a duplicate (*f*), or expressed to be merely a deed of confirmation (*g*). It seems to be a question whether, under a covenant for further assurance, a purchaser can require to be furnished with a covenant or an acknowledgment for production of title deeds (*h*); but it does not appear that he can have any larger right in this respect by virtue of such a covenant than he enjoyed under the contract of sale (*i*). And if the conveyance did not contain such an acknowledgment as the purchaser was entitled to require, it does not appear that the contract of sale has been completely discharged, so as to prevent the purchaser from suing on the particular stipulation respecting the acknowledgment (*k*); more especially as acknowledgments are frequently given by a document separate from the conveyance (*l*). It is also a question whether a person executing a conveyance pursuant to a common covenant for further assurance is bound therein to covenant for title; but the better opinion appears to be that he is not; although a trustee executing such an assurance may be required to give the usual covenant against incumbrances (*m*). The usual covenant for further assurance (which is to do such acts as may reasonably be required for the purpose) is not broken by refusal to do an unnecessary act (*n*); nor if the failure to convey on request is occasioned by the act of God, as by the death (*o*), insanity (*p*), or severe illness (*q*) of the person whose assurance is required.

Measure of damages for breach of covenant for right to convey

For breach of the covenant for right to convey (which is, as we have seen (*r*), broken if the right be defective at the time of conveyance) the measure of damages is the difference between the value of the property as purported to be conveyed and its

(*f*) *Napper* v. *Allington*, 1 Eq. Ca. Abr. 166.
(*g*) 2 Dart, V. & P. 788, 5th ed.; 888, 6th ed.; 797, 7th ed.
(*h*) See *Hallett* v. *Middleton*, 1 Russ. 243; *Fain* v. *Ayers*, 2 S. & S. 533; Sug. V. & P. 613.
(*i*) Above, pp. 642 *sq.*, 1100.
(*k*) See above, pp. 989, 997.
(*l*) Above, p. 650.
(*m*) See Sug. V. & P. 614, 615.
(*n*) *Warn* v. *Bickford*, 9 Price, 43.
(*o*) *Nash* v. *Aston*, T. Jones, 195.
(*p*) *Pet and Cally's case*, 1 Leon. 304.
(*q*) *Anon.*, Moore (K. B.), 124.
(*r*) Above, p. 1090.

value as the vendor had power to convey it (*s*). And it is important to observe that the true measure of damages is the difference, not between the *price paid* and the value of the property as conveyed, but in the value of the property as purported to be and as actually conveyed (*t*); so that if the property as purported to be conveyed were worth more at the time of conveyance than the price paid for it, the purchaser would be entitled to the difference in the value at that time of what he contracted to buy and what he got (*u*). And of course by the same rule, if the price paid were in excess of the value, the purchaser would still be entitled to recover the difference in value only. But it appears that, in the absence of any other evidence as to the value of the property, as purported to be conveyed, at the time of conveyance, the price paid will be taken to be the value thereof (*v*). If, therefore, the property were sold and conveyed as free from incumbrances, and it turn out to be subject to some outstanding estate, interest or right, which is covered by the terms of the covenant for right to convey (*x*), the purchaser will be entitled to recover the amount by which the existence of the adverse interest has diminished the value of the purchased property (*y*). And where the purchaser has been obliged to pay off any outstanding mortgage or charge covered by the covenants for title, or to buy in any estate or interest so covered, in order to procure for himself the actual enjoyment of the property as purported to be conveyed, he will

(*s*) *Gray* v. *Briscoe*, Noy, 142; *Wace* v. *Bickerton*, 3 De G. & Sm. 751; *Jenkins* v. *Jones*, 9 Q. B. D. 128; *Turner* v. *Moon*, 1901, 2 Ch. 825, 829; *Great Western Ry. Co.* v. *Fisher*, 1905, 1 Ch. 316, 323; *Eastwood* v. *Ashton*, 1913, 2 Ch. 39, 54, 55; reversed on the construction of the conveyance, 1914, 1 Ch. 68; restored, 1915, A. C. 900.

(*t*) *Eastwood* v. *Ashton*, ubi sup.

(*u*) *Jenkins* v. *Jones*, 9 Q. B. D. 128. It is submitted that this case proves that the same measure of damages is applicable on breach of covenants for title entered into on a conveyance of land as on breach of a warranty of title or quality given on a sale of goods; see *Loder* v. *Kekulé*, 3 C. B. N. S. 128; *Jones* v. *Just*, L. R. 3 Q. B. 197; *Re Bahia and San Francisco Ry. Co.*, ib. 584; *Re Ottos Kopje Diamond Mines, Ltd.*, 1893, 1 Ch. 618; *Balkis Consolidated Co.* v. *Tomkinson*, 1893, A. C. 396.

(*v*) *Turner* v. *Moon*, 1901, 2 Ch. 825, 829; cf. above, p. 1029.

(*x*) Above, p. 1091.

(*y*) See *Kingdon* v. *Nottle*, 4 M. & S. 53, 54; *David* v. *Sabin*, 1893, 1 Ch. 523, 527, 537, 541, 546 (above, p. 1092); *Page* v. *Midland Ry. Co.*, 1894, 1 Ch. 11, 21; *May* v. *Platt*, 1900, 1 Ch. 616, 623; and cases cited above, n. (*s*).

be entitled to recover the money so expended (*z*). Where such outstanding estate amounts to the entire rightful ownership of the property sold, so that what the vendor had power to convey was of no value at all, and the purchaser has never been in possession or was immediately ejected, the purchaser will be entitled to recover the whole value of the property as purported to be conveyed (*a*). If, however, the vendor had any, even a mere possessory title to the land conveyed, and the purchaser have actually had some beneficial enjoyment thereunder, it appears that the value of the interest so actually enjoyed would have to be deducted.

Breach of covenant for quiet enjoyment.

The measure of damages for breach of a covenant for quiet enjoyment (which, as we have seen (*b*), is not broken until some actual disturbance has taken place) is what the covenantee has lost in consequence of the breach of covenant; that is to say, in case of an entire eviction, the value at the date of the breach of the property so taken away from him (*c*). And where the purchaser has not been altogether deprived of the property conveyed to him, but its value has been permanently diminished by the assertion of some outstanding estate or interest comprehended in the covenant, he is entitled to recover the difference between the value at the date of the breach of the property as contracted to be enjoyed by him and its value in the state in which it remains to him immediately after the breach (*d*). But the remedy on a covenant for quiet enjoyment is not limited to the value of the property of which the purchaser has been deprived: he may recover thereunder all damages which are the natural consequence of the breach (*e*), such as the expense (where he has been ejected) of moving into a new house or place of business (*f*). Where the breach of a covenant for quiet enjoyment is not an entire eviction, nor a permanent alienation of some part of the covenantee's estate, but is only a temporary disturbance, as by entry under a right of way, the measure

(*z*) *Great Western Ry. Co.* v. *Fisher,* 1905, 1 Ch. 316.
(*a*) *Jenkins* v. *Jones,* 9 Q. B. D. 128.
(*b*) Above, p. 1094.
(*c*) *Williams* v. *Burrell,* 1 C. B. 402, 410, 433; *Lock* v. *Furze,* L. R. 1 C. P. 441; *Rolph* v. *Crouch,* L. R. 3 Ex. 44, 49, 50; *Jenkins* v. *Jones,* 9 Q. B. D. 128.
(*d*) See cases cited above, p. 1102, n. (*y*), n. (*z*).
(*e*) See above, p. 1102.
(*f*) *Grosvenor Hotel Co.* v. *Hamilton,* 1894, 2 Q. B. 836, 840.

of damages is not the same as for breach of a covenant for right to convey—that is, the difference in value (*g*)—but is only the actual inconvenience suffered up to the date of the assessment of damages (*h*).

Interest.

Where the purchaser has been evicted, he is entitled to recover interest on the assessed value of the land, from the date of eviction until payment, by way of damages for loss of profits during the time that he has been out of possession (*i*). And on the same principle he is entitled to interest on the amount of any outstanding charge or claim, which is covered by the covenants for title, and which he has paid off or bought in (*k*). It appears, however, that if the purchaser be negligent in not suing at once upon the covenants for title, he may be deprived of interest for any time that he has been kept out of the principal money by his own delay (*l*).

Improvements.

If the purchaser should have expended money on improvements subsequently to the conveyance, it has been a question how far he can recover the value of the improvements, in case of his eviction, under the covenants for title. It appears that as regards the covenant for right to convey, the damages ought to be measured by the value of the land at the time of the breach of covenant, that is, at the date of the execution of the conveyance (*m*); and this would of course exclude compensation for any subsequent improvements. But with respect to the covenants for quiet enjoyment and freedom from incumbrances, which are not broken until some actual disturbance has taken place (*n*), the case is different; and the better opinion appears to be that under these covenants an evicted purchaser is entitled to recover the actual value of the land, as it existed at the date of the breach of covenant. This would include the value of any buildings or similar improvements which the purchaser had erected or made. It appears to be admitted that the value of such improvements would be recoverable where by the contract of sale it was contemplated that they should be

(*g*) Above, p. 1101.
(*h*) *Child* v. *Stenning*, 11 Ch. D. 82; R. S. C. Ord. XXXVI. r. 58.
(*i*) *King* v. *Jones*, 5 Taunt. 418, 422.
(*k*) *Great Western Ry. Co.* v. *Fisher*, 1905, 1 Ch. 316.
(*l*) *Anderton* v. *Arrowsmith*, 2 Per. & Dav. 408.
(*m*) Above, pp. 1090, 1101.
(*n*) Above, p. 1094.

made (*o*). But it is submitted that in measuring the damages for breach of a covenant for quiet enjoyment, the true question is what was contemplated by that contract, and not by the contract of sale. And where land is conveyed on a sale to a purchaser in fee, with a covenant for quiet enjoyment, what is contemplated appears to be that he shall quietly enjoy the same as full owner and with the owner's liberty to use or improve the premises as he will. And if he be evicted for some cause, which occasions a breach of this covenant, his loss appears to be truly measured by the value at that time of the property from which he has been ejected (*p*); and these damages seem to be such as are the natural consequence of the breach, or at least such as the parties to the covenant must have contemplated as the result thereof (*q*). It is further submitted that the rule, which entitles an evicted purchaser to recover, on a breach of a covenant for quiet enjoyment, the value of the property as it existed at the date of the breach (*r*), will enable him to recover the full value of the land at that time, notwithstanding that its value should have been enhanced, since it was conveyed to him, by circumstances independent of his own outlay or efforts (*s*). Of course the same rule gives to the covenantor the benefit of any fall since the conveyance in the value of the property sold (*t*).

Compromise by the purchaser of adverse claims on the land purchased.

The purchaser may well compromise or refer to arbitration any adverse claim made upon him, which would be covered by the vendor's covenants for title, without giving notice to the vendor of the claim or his proceedings; and he will be entitled to recover under the covenants the amount paid or awarded to be paid by him as compensation and costs to the claimant, with

(*o*) *Bunny* v. *Hopkinson*, 27 Beav. 565.

(*p*) This rule appears to have been applied in *Lock* v. *Furze*, L. R. 1 C. P. 441, and *Rolph* v. *Crouch*, L. R. 3 Ex. 44, 49, 50, where the plaintiff recovered the value of a conservatory erected by him; and it is submitted that those decisions outweigh the authority of the *dicta* to the contrary in *Lewis* v. *Campbell*, 3 J. B. Moore, 35, 52, 54, 57; and see 2 Dart, V. & P. 793, 794, 5th ed.; 894, 6th ed.; 863, 7th ed., and consider *Grosvenor Hotel Co.* v. *Hamilton*, 1894, 2 Q. B. 836; above, pp. 1103, 1104.

(*q*) Above, p. 1023.

(*r*) Above, p. 1103.

(*s*) It is submitted that the opinion to the contrary expressed in Mayne on Damages, 256, 8th ed., cannot be supported since the decisions cited above, p. 1103, n. (*c*).

(*t*) Above, pp. 1101-1103.

interest thereon at 4 per cent. per annum from the date of payment, and his own solicitor's costs of the compromise or arbitration to be taxed as between solicitor and client (*u*). If, however, the vendor had received no notice of the claim and the intention to compromise it, he would be at liberty to prove in defence that the claim was unfounded, either wholly or partially, or that he could have made better terms than the purchaser, or that the purchaser made an improvident bargain: though in these respects he would have to bear the burthen of proof. On the other hand, if notice of the claim be given to the vendor and he decline or fail to remove or contest it himself, he will be estopped from alleging any such grounds of defence (*x*). But if an action or other proceeding in Court be brought by an adverse claimant against the purchaser, he cannot safely defend it without giving notice to the vendor or other person liable on the covenants for title, and obtaining his directions as to the course to be pursued. For if the purchaser omit to do this, and there be no good nor reasonably probable (*y*) ground of defence, he will not be entitled to recover any costs of defending the proceedings against him as damages necessarily resulting from the breach of covenant (*z*). If the purchaser obtain the vendor's authority to defend the action, or if with the vendor's authority the purchaser himself institute proceedings against an adverse claimant, he will be entitled to recover his costs of the proceedings, though unsuccessful therein (*a*). And it has been held that, if the purchaser give such notice as aforesaid and his application be disregarded, he may then defend the proceedings at his own discretion and without any express authority from the covenantor; and he will be entitled to recover under the covenant his costs of the defence, namely, any costs that he may have been ordered to pay to the successful party, and his own costs taxed as between solicitor and client (*b*).

Action brought against the purchaser.

(*u*) *Great Western Ry. Co.* v. *Fisher*, 1905, 1 Ch. 316.

(*x*) *Smith* v. *Compton*, 3 B. & Ad. 407.

(*y*) See *Agius* v. *Great Western Colliery Co.*, 1899, 1 Q. B. 413, 421, 423; and above, p. 1029.

(*z*) *Short* v. *Kalloway*, 11 A. & E. 28, 31; *Walker* v. *Hatton*, 10 M. & W. 249; *Pow* v. *Davis*, 1 B. & S. 220; *Great Western Ry. Co.* v. *Fisher*, 1905, 1 Ch. 316, 323.

(*a*) *Williams* v. *Burrell*, 1 C. B. 402; *Child* v. *Stenning*, 11 Ch. D. 82.

(*b*) *Rolph* v. *Crouch*, L. R. 3 Ex. 44; *Great Western Ry. Co.* v. *Fisher*, 1905, 1 Ch. 316, 323, 324; see also *Agius* v. *Great Western Colliery Co.*, 1899, 1 Q. B. 413.

But even in this case it is questionable whether he could recover any such costs, if the facts were such that any defence must be hopeless (*c*). Where an award in an arbitration or judgment in an action has been given against the purchaser, he should not defend an action on the award or appeal against the judgment, without the covenantor's express direction; otherwise he will be unable to recover any costs of such proceedings as damages (*d*).

Covenants for title run with the land, and are apportionable.

It has been already explained (*e*) how the benefit, both of the statutory and of express covenants for title, runs with the land, in respect of which the covenants were given; and that the covenants may be enforced by any person taking the whole or any part of the covenantee's estate, and are apportionable accordingly. If a breach of covenants for title be committed, and the covenantee die without suing thereon, the right of action will, in so far as he has suffered any actual damage, belong to his executors or administrators (*f*): but will otherwise pass to the person who has succeeded to his estate in the land (*g*).

Where land is sold with notice of a defective title.

Covenants for title are construed literally according to the rules of law for the interpretation of written instruments; and extrinsic evidence is not in general admissible to explain them (*h*). If, therefore, they extend in terms to guarantee indemnity against some particular defect of title, it is no defence to an action on the covenants to plead that the purchaser bought with notice of the defect and agreed to take the property subject thereto (*i*). So, also, if the words of the covenant com-

(*c*) See *Agius* v. *Great Western Colliery Co.*, 1899, 1 Q. B. 413, 421, 423.

(*d*) *Great Western Ry. Co.* v. *Fisher*, 1905, 1 Ch. 316, 323; but see *Sutton* v. *Baillie*, 65 L. T. 528, where the costs of an appeal were allowed on the ground that it was reasonable, two judges of first instance having given conflicting decisions.

(*e*) Above, pp. 618, 619; and observe the facts in *David* v. *Sabin*, above, p. 1092.

(*f*) *Lucy* v. *Levington*, 2 Lev. 26; *Raymond* v. *Fitch*, 2 C. M. & R. 588, 597-599.

(*g*) *Kingdon* v. *Nottle*, 1 M. & S. 354, 4 M. & S. 53; *King* v. *Jones*, 5 Taunt. 418; *Jones* v. *King*, 4 M. & S. 188.

(*h*) Above, pp. 769, and n. (*g*), 770.

(*i*) *Page* v. *Midland Ry. Co.*, 1894, 1 Ch. 11; *May* v. *Platt*, 1900, 1 Ch. 616; *Great Western Ry. Co.* v. *Fisher*, 1905, 1 Ch. 316, 322; see above, pp. 188, 605-607.

prehend a particular defect of title, it is no plea to point out that the defect was apparent on the face of the conveyance (*k*); unless it can be established that upon the true construction of the whole deed of conveyance the assurance was expressly made subject to the defect and the covenant did not guarantee indemnity against it (*l*). But if in these cases the purchaser bought subject to the defect, the vendor might counterclaim for rectification of the conveyance by limiting the covenants according to the parties' real agreement (*m*).

Covenants for title procured by fraud.

It was held in the case of *David* v. *Sabin* (*n*) that, if a man by fraud procure land to be sold and conveyed to him, with the usual vendor's covenants for title, the vendor may indeed set up the fraud as a defence to an action brought on the covenants by the purchaser himself; but if the defrauding party convey the land over to a purchaser taking it for value and without notice of the fraud, and such purchaser sue the original vendor to obtain the benefit of *his* covenants for title, as running with the land sold, the original vendor can no longer plead the fraud, by which he was induced to enter into the covenants. This was so decided on the following grounds:—The defence of the original vendor to an action by the original purchaser on the covenants for title might be two-fold; first, that the covenants were voidable as having been procured by fraud and that he elected to avoid them (*o*); secondly, that the *breach* of the covenants was caused by the covenantee's own wrong, and the covenantee could not therefore set up the breach as a cause of action (*p*). As to the first of these defences, it was considered that where a man makes a conveyance of land and at the same time enters into covenants with his grantee, of which the benefit will run with the land (that is, will go to the grantee's assigns by virtue of the "real contract" then made by the grantor (*q*)), such conveyance and real contract together form

(*k*) *Page* v. *Midland Ry. Co.*, 1894, 1 Ch. 11; *Great Western Ry. Co.* v. *Fisher*, 1905, 1 Ch. 316, 322.

(*l*) See above, pp. 605-607, 617, n. (*r*).

(*m*) See above, pp. 605, and n. (*k*), 623, 770 *sq.*, 775-777, 787.

(*n*) 1893, 1 Ch. 523; above, pp. 620, 1092.

(*o*) Above, p. 1039.

(*p*) This was the case in *David* v. *Sabin*, where the fraud of the covenantee caused an incumbrance to remain outstanding without the knowledge of the covenantor, and so occasioned the breach of covenant; see above, p. 1092.

(*q*) See *Stevenson* v. *Lambard*, 2 East, 575, 580; Sug. V. & P. 576.

one entire transaction, and the real contract cannot be rescinded for fraud without setting aside the conveyance. And as in such case the conveyance cannot be avoided by the grantor as against any person claiming as a purchaser from the grantee for value and without notice of the fraud (*r*), the real contract must remain equally unimpeachable as against such a purchaser. And as regards the second defence above mentioned, that is only available against the party who actually did the wrong, or his representatives in law, and not against his assigns.

Bankruptcy of covenantor for title.

It appears that, under the present Bankruptcy law, the liability of a person, who has entered into covenants for title, in so far as it consists in any obligation or possibility of an obligation to pay money on breach of the covenants, is capable of proof in his bankruptcy, and will be discharged by an order of discharge made or by a composition or scheme of arrangement approved therein (*s*). But the covenantor's liability under a covenant for further assurance, in so far as it is capable of being enforced *specifically* (*t*), is not capable of proof in nor discharged by his bankruptcy (*u*), but may be asserted against the trustee in the bankruptcy, or against the covenantor himself after his discharge, or his representatives in law or gratuitous or equitable assignees (*x*).

If one sell land and execute a defective conveyance, he will be bound in equity to make good the contract out of any estate in the land that he may afterwards acquire.

We have seen that if, without making any fraudulent misrepresentation, a man sell lands, to which he has no good title, and convey the same to the purchaser, but give him no covenants for title, or covenants not availing against the defect (*y*), the purchaser has no right or equity to recover the purchase money in case of his ejectment after the conveyance, and has in general no remedy (*z*). There is, however, one contingency in which he may obtain satisfaction. If the vendor should chance to acquire by any means after the conveyance some valid estate or interest in the land sold, he will be bound in equity to assure the same in such manner as will make good his contract of

(*r*) Above, pp. 748, 749, 813.
(*s*) See above, p. 988; *Hardy* v. *Fothergill*, 13 App. Cas. 351.
(*t*) See above, p. 1099.
(*u*) See *Re Reis*, 1904, 2 K. B. 769, 777, 781, 787.
(*x*) Above, pp. 1099, 1100, and note (*c*).
(*y*) Above, pp. 608, 1089.
(*z*) Above, pp. 575, 613, 614, 1085, 1089.

sale (*a*). For in such case the rule of equity is that, as the conveyance has proved to be defective, the vendor shall not plead that the contract has been already discharged by performance (*b*). And this rule is applicable to any contract to convey land for valuable consideration, and to agreements of mortgage, settlement or exchange as well as of sale (*c*). It was suggested in one case (*d*) that this equity is personal to the contractor and is not available against his successors in estate. This opinion, however, was judicially dissented from by Lord St. Leonards (*e*), and appears to be unsound in principle (*f*). The true rule seems to be that, if the vendor himself had once become entitled to a valid estate in the land, the purchaser's equity would attach upon it in the hands of all persons claiming under the vendor, otherwise than for a legal interest by purchase for value without notice (*g*). But, of course, if the vendor's eldest son and heir or other successor should acquire a valid interest in the land sold by an independent title, not derived from the vendor, he would not be bound to give effect to the sale (*h*). And if the vendor had sold and conveyed some particular estate or interest only in the land or such interest as he had therein, so that the conveyance actually gave effect to the contract, but the interest conveyed afterwards came to an end, the vendor would not be bound to assure to the purchaser any new estate or interest which he might acquire after the conveyance (*i*).

Vendor's after-acquired estate passing

As previously explained (*k*), if the conveyance to the purchaser contained a precise averment of the vendor's seisin in

(*a*) *Seabourne* v. *Powel*, 2 Vern. 11; *Noel* v. *Bewley*, 3 Sim. 103, 116; *Jones* v. *Kearney*, 1 Dru. & War. 134, 158-160; *Smith* v. *Baker*, 1 Y. & C. C. C. 223; *Smith* v. *Osborne*, 6 H. L. C. 375, 390, 398; *Re Bridgwater's Settlement*, 1910, 2 Ch. 342; *Re Harper's Settlement*, 1919, 1 Ch. 270-275, 276; Sug. V. & P. 745; 2 Dart, V. & P. 808, 5th ed.; 909, 6th ed.; 818, 7th ed.

(*b*) Above, p. 988.

(*c*) See cases cited in note (*a*), above; as to marriage settlements, *Re Harper's Settlement*, ubi sup.; as to leases, 2 Prest. Abstr. 217, 2nd ed.; Wms. Real Prop. 397, 13th ed. (553, 23rd ed.).

(*d*) *Morse* v. *Faulkner*, 1 Anst. 11, 14.

(*e*) *Jones* v. *Kearney*, 1 Dru. & War. 134, 159.

(*f*) 2 Dart, V. & P. 809, 810, 5th ed.; 910, 911, 6th ed.; 819, 820, 7th ed.

(*g*) See *Martin* v. *Seamore*, 1 Ch. Ca. 170; *Taylor* v. *Wheeler*, 2 Vern. 564; *Jennings* v. *Moore*, ib. 609; and cf. above, p. 1099.

(*h*) Cf. above, p. 1099.

(*i*) See *Smith* v. *Osborne*, 6 H. L. C. 375, 390, 398; above, p. 1100.

(*k*) Above, pp. 585, 586.

fee or other right, sufficient to work an estoppel at law, then if the vendor had not the estate specified at the time of conveyance but afterwards acquired it, the same would immediately pass in effect to the purchaser, his heirs or assigns, without any further conveyance, by reason of the doctrine that the acquisition of the legal estate "feeds" the estoppel. An estate by estoppel of this kind would be available in favour of the purchaser, his heirs and assigns, as against all persons claiming the whole or any part of the vendor's after-acquired estate by any title derived from him, whether gratuitously or for value and whether for a legal or an equitable interest (*l*). But the legal estate would not so pass as against any person not bound by the estoppel (*m*).

to the purchaser by estoppel.

(*l*) See *Rawlyns' case,* 4 Rep. 52 a, 53 a; *Weale* v. *Lower,* Pollexf. 54, 66; *Taylor* v. *Needham,* 2 Taunt. 278; *Bensley* v. *Burdon,* 2 S. & S. 519, 524, 525, affirmed, 8 L. J. (O. S.) Ch. 85; *Doe* d. *Christmas* v. *Oliver,* 10 B. & C. 181; *Webb* v. *Austin,* 7 Man. & Gr. 701, 724 *sq.; Doe* d. *Gaisford* v. *Stone,* 3 C. B. 176; *Clemow* v. *Geach,* L. R. 6 Ch. 147.

(*m*) See *Doe* d. *Downe* v. *Thompson,* 9 Q. B. 1037.

CHAPTER XX.

OF THE SALE OF REGISTERED LAND.

Land registered under the Land Transfer Acts.

THE principles to be applied in carrying out a sale of land registered under the Land Transfer Acts, 1875 and 1897 (*a*), depend upon the provisions of these statutes and the rules made thereunder (*b*), and especially upon the effect thereby given to first registration under the Acts, and to registered transfers and charges of registered land (*c*). It would be out of place in a work like the present to give a general description of the system of registration of title established by these statutes. A short account of it is contained in the writer's last edition of "Williams on Real Property" (*d*), and it will be assumed that the reader has a general acquaintance with the statutory provisions in question. We will here confine our attention to the sale of registered land, and will follow the plan, previously adopted with respect to the general law of sale (*e*), of endeavouring to ascertain what are the provisions of an open contract for the sale of registered land.

Contracts to sell registered land.

In the first place, it may be noted that contracts to sell registered land are not capable of registration nor required to assume any special form. They are governed by the general law relating to the formation of contract (*f*). They must, of course, conform with the requirements of the Statute of Frauds (*g*), and, subject to the express enactments of the Land

(*a*) Stats. 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65.
(*b*) See Land Transfer Rules, 1903, 1907 and 1908. The Rules have been issued in consolidated form by the Land Registry (1912), but not under the authority of the Land Transfer Rules Committee; see Land Transfer Act, 1897, s. 22 (2).
(*c*) See stats. 38 & 39 Vict. c. 87, ss. 7-9, 13, 22, 25-27, 31, 32, 35; 60 & 61 Vict. c. 65, First Schedule; Land Transfer Rules (1903 and 1908), 52-59, 140-142; Wms. Real Prop. 705-710, 23rd ed.
(*d*) Part VII., pp. 697 *sq.*, 23rd ed.
(*e*) Above, pp. 31 *sq.*
(*f*) Above, pp. 1-30.
(*g*) Stat. 29 Car. II. c. 3, s. 4; above, pp. 3 *sq.*

Transfer Acts (*h*), they appear to incorporate the terms implied by law in any other contract for the sale of land (*i*), including the provisions annexed to sales of land by the Vendor and Purchaser Act, 1874 (*k*), and the Conveyancing Act, 1881 (*l*). The express enactments of the Land Transfer Acts regulating contracts for the sale of registered land are the following:—

Proof of title, which can be required on purchase of registered land.

(Land Transfer Act, 1897 (*m*), s. 16, sub-s. 1.) A purchaser of registered land shall not require any evidence of title, except—

(i) the evidence to be obtained from an inspection of the register, or of a certified copy of or extract from the register;

Matters declared not to be incumbrances.

(ii) a statutory declaration as to the existence or otherwise of matters which are declared by sect. 18 of the principal Act (*n*), and by this Act, not to be incumbrances (*o*);

(*h*) See stat. 60 & 61 Vict. c. 65, ss. 8 (2, 3), 16, stated below.
(*i*) Above, pp. 31-34, 38-50; and see p. 93, and n. (*d*).
(*k*) Stat. 37 & 38 Vict. c. 78, ss. 1, 2.
(*l*) Stat. 44 & 45 Vict. c. 41, s. 3.
(*m*) Stat. 60 & 61 Vict. c. 65.
(*n*) The Land Transfer Act, 1875; stat. 38 & 39 Vict. c. 87.
(*o*) By stat. 38 & 39 Vict. c. 87, s. 18, as amended by 60 & 61 Vict. c. 65, First Schedule, all registered land shall, unless under the provisions of the Acts the contrary is expressed on the register, be deemed to be subject to such of the following liabilities, rights and interests as may be for the time being subsisting in reference thereto, and such liabilities, rights and interests shall not be deemed incumbrances within the meaning of the Acts (that is to say):

(1) Liability to repair highways by reason of tenure, quit rents, Crown rents, heriots and other rents and charges having their origin in tenure; and

(2) Succession duty, estate duty, land tax, tithe rentcharge and payments in lieu of tithes or of tithe rentcharge; and

(3) Rights of common, rights of sheepwalk, rights of way, watercourses, and rights of water, and other easements; and

(4) Rights to mines and minerals created previously to the registration of the land or the 1st of January, 1898; and

(5) Rights of entry, search, and user, and other rights and reservations incidental to or required for the purpose of giving full effect to the enjoyment of rights to mines and minerals, or of property in mines or minerals, and created previously to the registration of the land or the 1st of January, 1898; and

(6) Rights of fishing and sporting, seignorial and manorial rights of all descriptions, and franchises exercisable over the registered lands; also liability to repair the chancel of any church, liability in respect of embankments and river walls, and drainage rights, customary rights, public rights, and profits *à prendre;* and

(7) Leases or agreements for leases and other tenancies for any term not exceeding twenty-one years, or for any less estate, in cases where there is an occupation under such tenancies; also, subject to

Where title absolute.

(iii) if the proprietor of the land is registered with an absolute title (*p*), and there are incumbrances entered on the register as subsisting at the first registration of the land, either evidence of the title to those incumbrances, or evidence of their discharge from the register;

the provisions of the Land Transfer Act, 1897 (see sect. 12), rights acquired or in course of being acquired under the Limitation Acts:

Provided as follows:

(a) Where it is proved to the satisfaction of the registrar that any land registered, or about to be registered, is exempt from land tax or tithe rentcharge, or from payments in lieu of tithes or of tithe rentcharge, the registrar may notify the fact on the register in the prescribed manner (see Land Transfer Rules (1903), 212); and

(b) The Commissioners of Inland Revenue shall, upon the application of the proprietors of any land registered or about to be registered, upon such declaration being made, or such other evidence being produced as the Commissioners require, and upon payment of the prescribed fee, grant a certificate that at the date of the grant thereof no succession duty is owing in respect of such land, and the registrar shall in the prescribed manner notify such fact on the register, and such notification shall be conclusive evidence of the fact so notified in respect of succession duty (see, however, stat. 60 & 61 Vict. c. 65, s. 13, which appears to supersede this provision); and

(c) Where it is proved to the satisfaction of the registrar that the right to any mines or minerals is vested in the proprietor of land registered or about to be registered, the registrar may register such proprietor in the prescribed manner as proprietor of such mines and minerals as well as of the land (see Land Transfer Rules (1903), 213); and

(d) Where it is proved to the satisfaction of the registrar that the right to any mines or minerals is severed from any land registered or about to be registered, the registrar may, on the application of the person entitled to any such mines and minerals, register him as proprietor of such mines and minerals in manner in the Act of 1875 mentioned (see sect. 82; Land Transfer Rules (1903), 71, 74), and upon such registration being effected shall enter on the register of the land a reference to the registration of such other person as proprietor of such mines and minerals (see Land Transfer Rules (1903), 214).

Where the existence of any such liabilities, rights or interests, as are mentioned in this section is proved to the satisfaction of the registrar, the registrar may, if he think fit, enter on the register notice of such liabilities, rights or interests, in the prescribed manner. This power shall be exercised in all cases where the abstract of title on first registration or on registration as qualified or absolute discloses the existence of any such liabilities as are mentioned in sub-sections 4 and 5 (see Land Transfer Rules (1903), 215). Where an easement is registered as an incumbrance, the dominant and servient tenements shall be defined, if practicable and required by the parties. Notice of a power of re-entry and of a right of reverter may be entered on the register under this paragraph.

(*p*) As to the effect of the registration of land with an absolute title and the registered transfer of land so registered, see stat. 38 & 39 Vict. c. 87, ss. 7, 13, 30, 35, 105; Land Transfer Rules (1903), 55, 140; 2nd Rep. (1911) of Land Transfer Commrs. § 57.

(iv) where the proprietor of the land is registered with a qualified title, the same evidence as above provided in the case of absolute title, and such evidence as to any estate, right, or interest excluded from the effect of the registration (*q*) as a purchaser would be entitled to if the land were unregistered; Where title qualified.

(v) if the land is registered with a possessory title, such evidence of the title subsisting or capable of arising at the first registration of the land (*r*) as the purchaser would be entitled to if the land were unregistered. Where title possessory.

(Sub-s. 2.) Where the vendor of registered land is not himself registered as proprietor of the land or of a charge giving a power of sale over the land, he shall, at the request of the purchaser and at his own expense, and notwithstanding any stipulation to the contrary, either procure the registration of himself as proprietor of the land or of the charge, as the case may be, or procure a transfer from the registered proprietor to the purchaser. Where vendor not registered as proprietor.

(Sub-s. 3.) In the absence of special stipulation, a vendor of land registered with an absolute title shall not be required to enter into any covenant for title, and a vendor of land registered with a possessory or qualified title shall only be required to covenant against estates and interests excluded from the effect of registration, and the implied covenants under sect. 7 of the Conveyancing and Law of Property Act, 1881, shall be construed accordingly. As to covenants for title.

(Sect. 8, sub-s. 2.) Where a land certificate (*s*) or an office Delivery of land certificate.

(*q*) The registration of land with a qualified title and the registered transfer of land so registered do not affect or prejudice the enforcement of any estate, right or interest appearing by the register to be excepted from the effect of registration; stat. 38 & 39 Vict. c. 87, ss. 9, 31; Land Transfer Rules (1908), I. 36, III.; (1903), 52, 58, 59, 140. The rules of 1903 introduced a particular kind of qualified title called a good leasehold title. Registration of land with a good leasehold title and the registered transfer of land so registered do not affect or prejudice the enforcement of any estate, right or interest affecting or in derogation of the lessor's title to grant the lease; Rules, 56, 141.

(*r*) The registration of land with a possessory title and the registered transfer of land so registered do not affect or prejudice the enforcement of any estate, right or interest adverse to or in derogation of the title of the first registered proprietor, and subsisting or capable of arising at the time of registration of such proprietor; stat. 37 & 38 Vict. c. 87, ss. 8, 32; Land Transfer Rules (1903), 57, 142.

(*s*) See stats. 38 & 39 Vict. c. 87, s. 10; 60 & 61 Vict. c. 65, s. 8; Land Transfer Rules (1903), 258-268.

copy of a registered lease (*t*) has been issued, the vendor shall deliver it to the purchaser on completion of the purchase, or, if only a part of the land comprised in the certificate or office copy is sold, he shall, at his own expense, produce, or procure the production of, the certificate or office copy in accordance with this section for the completion of the purchaser's registration (*u*). Where the certificate or office copy has been lost or destroyed (*x*), the vendor shall pay the costs of the proceedings required to enable the registrar to proceed without it.

What evidence of title can be required.

The above provisions are most important terms of an open contract for the sale of registered land, and must of course be considered in connexion with and as modifying the general law defining the relations of vendor and purchaser on a sale of land (*y*). The language of sect. 16 (1) (i) of the Land Transfer Act, 1897, is not clear: but as it is enacted that *the purchaser shall not require* any evidence of title *except* the alternatives specified, it appears that (save only as regards the registered lease upon the sale of registered leasehold land (*z*)) the vendor is not bound to furnish any abstract of any registered document (such as an instrument of transfer or charge) dealing with the land sold (*a*); and it seems to be in the option of the purchaser to require, as proof of the title to registered land, either the

No abstract of registered instruments.

(*t*) This was issued under the Land Transfer Act, 1875, on the registration of leasehold land: but under the Act of 1897 land certificates are issued on the registration of leasehold as well as of freehold land: stat. 38 & 39 Vict. c. 87, s. 16; Land Transfer Rules (1903), 65, 67.

(*u*) By stat. 60 & 61 Vict. c. 65, s. 8 (1), the land certificate or certificate of charge shall be produced to the registrar on every entry in the register of a disposition by the registered proprietor of the land or charge to which it relates, and a note of such entry is required to be officially endorsed thereon. And by the Land Transfer Rules (1903), 265, the registrar may require such certificate to be produced on any application for registration made by or with the consent of the registered proprietor of the land or of a charge or incumbrance.

(*x*) See sect. 8 (3).

(*y*) Above, pp. 31-34, 39-50.

(*z*) See below, p. 1148.

(*a*) It has been suggested that, on a sale of registered land, the abstract will consist of a copy of the entries in the register; 1 Key & Elph. Prec. Conv. 242, 8th ed.; 264, 10th ed. But it is questionable whether the vendor is bound to deliver anything in the nature of an abstract of his title to any registered land sold, except as regards estates, interests or rights excluded from the effect of registration. Where a vendor's title does not consist of a series of instruments of disposition, the whole ground for requiring an abstract appears to be taken away; see above, p. 97. And the language of the above mentioned enactment seems to preclude the purchaser from requiring any evidence of title other than that specified therein.

evidence to be obtained from an inspection of the register, or the evidence of a certified copy of or extract from the register. In order to avail himself of the former alternative he must obtain the authority of the vendor (*b*); and this, it is submitted, the vendor is bound to give. Having obtained such authority, the purchaser may either search the register himself or apply for an official search to be made, and the issue of a certificate of the result (*c*). If the purchaser choose to require a certificated copy of, or extract from, the register, and the vendor have none such in his possession, it appears that the purchaser must bear the expense of procuring the same (*d*). And if the purchaser obtain the vendor's authority to inspect the register, office copies of any entry in the register or of any document in the registry shall be issued, upon his application in writing, to him or his solicitor (*e*). The purchaser, it is thought, must also bear the expense of any statutory declaration which he may require under sect. 16 (1) (ii) of the Land Transfer Act, 1897, with regard to matters declared by sect. 18 of the Act of 1875 and the Act of 1897 not to be incumbrances (*d*). Sect. 16 (1) (ii) of the Act of 1897 (*f*) also lacks clearness of expression: but it is submitted that the existence or non-existence of the matters declared by the Acts not to be incumbrances is the only fact in connexion therewith as to which the purchaser is restricted to the evidence of the vendor's statutory declaration (*g*). If any such matters exist, they are not affected by the statutory provisions as to the effect of first registration and registered transfers (*h*). With respect to such matters, therefore, and also as to all other estates or interests excluded from the effect of registration—as, for instance, those expressly saved from the operation of registration with a qualified, a good leasehold, or a possessory title (*i*)—the sale of registered land appears to be governed by the general law. And if a man sell under an open contract any registered land which is subject to the existence of any estates or interests in-

Expenses of copies of or extracts from the register, and statutory declaration as to matters not incumbrances.

(*b*) Stat. 60 & 61 Vict. c. 65, s. 22 (7).
(*c*) Land Transfer Rules (1903), 284-293.
(*d*) Stat. 44 & 45 Vict. c. 41, s. 3 (6); above, pp. 33, 43, 112, 1113.
(*e*) Land Transfer Rules (1903), 294.
(*f*) Above, p. 1113.
(*g*) It should be observed that some of these matters may be found noted in the register; above, p. 1113, n. (*o*).
(*h*) Above, p. 1112, n. (*c*).
(*i*) Above, p. 1115, nn. (*q*), (*r*).

cluded in those declared not to be incumbrances, and necessary to be conveyed in order to make a good title—as, for instance, rights to mines or minerals created previously to the registration of the land or the year 1898 (*j*)—he must, it is submitted, deliver an abstract of the title for the period required by law in the case of unregistered land, and duly verify such abstract by producing the same evidence as could be required on the sale of unregistered land. If this be not done, the purchaser may, it is thought, object to the title and repudiate the contract, as he might in the case of unregistered land (*k*); or he may call upon the vendor to remove the objection and require the concurrence of the persons entitled to the outstanding estates or interests: but if he take this course, he should make the requisition without prejudice to, and reserving his right to repudiate the contract (*l*).

The register is the only good evidence of title to registered land.

The principal thing, then, which a purchaser of registered land has to ascertain is that the vendor is registered as proprietor of the land sold with such a title, either absolute, good leasehold (*m*), qualified or possessory, as he claims to have (*n*). Of this fact, the register *alone* is good evidence. It is most important to observe this. Possession of a land certificate showing the vendor to be registered as such proprietor is not sufficient; for the vendor may have created a statutory charge on the land without handing over the land certificate to the chargee (*o*), and the chargee may have subsequently sold the land under his power of sale, and the purchaser from him may have been registered as proprietor (*p*), or the chargee may

(*j*) Above, p. 1113, n. (*o*); see stat. 60 & 61 Vict. c. 65, First Schedule, amending sects. 18 (4, 5), 30-33, and 35-38 of the Land Transfer Act, 1875.

(*k*) See above, p. 152.

(*l*) See above, pp. 154, 177.

(*m*) See above, p. 1115, n. (*q*).

(*n*) The vendor may also make a good title as the registered proprietor of a registered charge giving power of sale; a case dealt with further on.

(*o*) As to the chargee allowing the land certificate to remain in the custody of the registered proprietor of the land, see Land Transfer Rules (1907), r. 259B.

(*p*) In the absence of stipulation to the contrary, the proprietor of a registered charge is not entitled to have custody of the land certificate; and where a transfer of land is made by the registered proprietor of a charge in exercise of the power of sale conferred by the charge, it may be registered, and a new land certificate may be issued to the purchaser, without production of the former land certificate; stat. 60 & 61 Vict. c. 65, s. 8 (4).

have foreclosed and procured himself to be registered as proprietor (*q*). It is essential, therefore, for a purchaser of registered land to ascertain the present state of the register, either by actual inspection or fresh certified copies (*r*). This will show him whether there are any estates, interests or rights (other than those declared not to be incumbrances) which will not be either conveyed to him or else extinguished by the effect of the registered transfer of the land from the vendor to himself (*s*). Such estates, interests or rights may exist, as we have seen (*t*), in the form of (1) registered incumbrances created either before or after registration, and (2) things exempted from the effect of registration with a good leasehold (*u*), qualified or possessory title; besides which there are (3) the things declared by the Acts not to be incumbrances. All such estates, interests or rights, as would interfere with the acquisition by the purchaser of the estate contracted for must be got in or cleared away. If existing in the form of registered incumbrances, they must be discharged (*x*); and if existing in the shape of things declared not to be incumbrances or exempted from the effect of registration with a good leasehold, qualified or possessory title, the title thereto must be proved, and they must be conveyed or released in the same manner as if the land were not registered.

Discharge of registered incumbrances.

Registered incumbrances may exist in the form either of incumbrances prior to first registration, which are now required to be entered in the register upon every first registration, whether with an absolute title or otherwise (*y*), or of incumbrances subsequent to registration, these being the registered charges which a registered proprietor is empowered by the Acts to make (*z*).

(*q*) See stat. 60 & 61 Vict. c. 65, s. 8; Land Transfer Rules (1903), 164.

(*r*) Above, pp. 1116, 1117.

(*s*) See above, pp. 1112, n. (*c*), 1115, nn. (*q*), (*r*).

(*t*) Above, pp. 1113-1115.

(*u*) Above, p. 1115, n. (*q*).

(*x*) See stat. 38 & 39 Vict. c. 87, ss. 19, 28; Land Transfer Rules (1903), 17, 166, 216, 217.

(*y*) Land Transfer Rules (1908), I. 43, commencing 1st Jan. 1909, and replacing L. T. R. (1903), 19, 21, 46, 49, under which such incumbrances were only required to be registered on an application for first registration with an absolute title.

(*z*) See stats. 38 & 39 Vict. c. 87, ss. 22-28; 60 & 61 Vict. c. 65, s. 9 (2-5); Land Transfer Rules (1903), 97 *sq.*, 158 *sq.*

Incumbrances prior to first registration.

It will have been observed that, with respect to registered incumbrances prior to first registration with an absolute title, the purchaser may require evidence either of the title to them or of their discharge (*a*). It is thought to lie in the purchaser's option which kind of evidence he will call for. Registered incumbrances prior to first registration may be either simply noted as such in the register, without any person being registered as the proprietor of them, or they may be entered as registered charges belonging to the persons entitled to them (*b*). In either case the cessation of the incumbrance may be notified in the register, by cancellation of the original entry or otherwise, on proof to the satisfaction of the registrar of the discharge of the incumbrance (*c*). Where no one has been registered as the proprietor of the incumbrance, the proof required, in case there has been no dealing with or transmission of the incumbrance, is either the instrument creating the incumbrance with a receipt or release thereon, signed by the incumbrancer, or an instrument of discharge in the form provided by the rules: but if there has been any dealing with or transmission of the incumbrance, the title to expunge the same from the register must be proved as in cases of examination of title on first registration (*d*). Where any person has been registered as proprietor of the incumbrance, the cessation thereof may be notified in the register on production of an instrument of discharge executed by the registered proprietor thereof (*e*) and of the certificate of incumbrance (*f*). It does not appear, however, that notifying in the register the cessation of such an incumbrance operates as a reconveyance of the legal estate, where the incumbrance was created by a mortgage in the usual form made when the land was unregistered; though, of course, after satisfaction of the charge the legal estate would be held in trust for the registered proprietor of the land, and would be extinguished by

Instrument of discharge.

(*a*) Above, p. 1114.

(*b*) See Land Transfer Rules (1903), 175-181.

(*c*) Stat. 38 & 39 Vict. c. 87, s. 19, amended by 60 & 61 Vict. c. 65, First Schedule.

(*d*) Land Transfer Rules (1903), 216; see L. T. R. (1908), I. 19, 24-26; L. T. R. (1903), 166, and First Schedule, Form 48.

(*e*) L. T. R. (1903), 217. It appears that an instrument of discharge need not be executed as a deed, but must be signed by the registered proprietor of the charge; rr. 107, 166, 177. Such signature should be attested; but cf. rr. 107, 108 with Form 48 in First Schedule.

(*f*) Ibid. r. 181; above, p. 1116, n. (*u*).

the effect of a registered transfer for value subsequently made by him (*g*). A purchaser from the registered proprietor of the land would therefore get the legal estate on registration of the transfer to himself, provided that the registered incumbrances were discharged prior to or on completion.

Where the proprietorship of the incumbrance is registered, and the title to the land is absolute.

Where the persons entitled to incumbrances prior to first registration with an *absolute* title have been entered in the register as the proprietors thereof, it appears unnecessary for the purchaser to investigate their title (*h*). The only essential thing is that the incumbrances shall be discharged and cleared off the register; after which the purchaser (in the case of freeholds) will get the entire fee simple by the effect of the transfer to himself, duly completed by registration, from the vendor registered with an absolute title (*i*). All that the purchaser need require is that the registered proprietors of the incumbrances shall execute the necessary instruments of discharge, which may be either contained in separate documents or included in the instrument of transfer to himself (*j*), and shall produce their certificates of incumbrance. But where the purchaser is buying land registered with a possessory title only, and there are registered incumbrances, prior to first registration, whereof the proprietorship is registered, it is essential for him to investigate the title to the incumbrances in the same manner as if they were not registered. For in such case his own registration as proprietor will not have the effect of extinguishing *all* unregistered estates and interests, but will take effect subject to any estate, right or interest adverse to or in derogation of the estate of the first registered proprietor, and subsisting or capable of taking effect at the time of the first registration (*k*). And although a mortgagee is required to prove his title before he can be registered as the proprietor of an incumbrance prior to first registration (*l*), his registration as such proprietor has not any extinguishing effect upon any estates, rights or interests

Where the registered title to the land is possessory.

(*g*) Above, pp. 1112, n. (*c*), 1114, n. (*p*); below, p. 1126.

(*h*) Their title is required to be proved in the registry before they can be entered as proprietors of the incumbrances; Land Transfer Rules (1903), 175.

(*i*) Land Transfer Rules (1903), 166, 182.

(*j*) Above, pp. 1112, n. (*c*), 1114, n. (*p*); below, p. 1126.

(*k*) Above, p. 1115, n. (*r*); below, p. 1126.

(*l*) Above, n. (*h*).

Where the proprietorship of the incumbrance is not registered.

adverse to his own (*m*). Where incumbrances prior to first registration are simply noted in the register, without any registered proprietor thereof, then (whether the registered title to the land be absolute or otherwise) the purchaser must require the title thereto to be abstracted and produced in the same manner as if the incumbrances were not noted in the register; for he must satisfy himself that such evidence can be produced of the title to the incumbrances and of their discharge as shall be sufficient to procure their removal from the register (*n*).

Registered charges subsequent to registration.

With respect to registered charges created subsequently to the registration of the land, the principal thing to be required is that they shall be discharged and cleared off the register. The cessation of such charges may be notified on the register, by cancellation of the original entry or otherwise, either on the requisition of the registered proprietor of the charge or on due proof of the satisfaction thereof; and thereupon the charge shall be deemed to have ceased (*o*). The proof usually required is the production of an instrument of discharge signed by the registered proprietor of the charge (*p*): but the registrar may accept such other proof as he shall deem sufficient (*q*). In any case the certificate of charge must also be produced (*r*).

Satisfaction of registered charges out of purchase money.

Whenever registered land is subject to any registered incumbrances or charges, the purchaser must of course not pay the purchase money to the vendor, until the incumbrances have been first fully satisfied thereout, except with their consent (*s*). Where, as usually happens, the incumbrances are to be discharged out of the purchase money, the necessary instruments

(*m*) The effect of the registration of any person as the proprietor of a registered incumbrance prior to first registration appears to be to confer on him a statutory charge similar to that given by the Land Transfer Acts to a chargee from a registered proprietor; see stat. 60 & 61 Vict. c. 65, s. 22 (6 c); Land Transfer Rules (1903), 175-181. But the Acts do not give to a registered charge or to a registered transfer thereof any such vesting and extinguishing effect as they give to first registration as proprietor of the land or to registered transfers of the land; see *A.-G.* v. *Odell*, 1906, 2 Ch. 47, 70-73, 78.

(*n*) Above, p. 1119.

(*o*) Stat. 38 & 39 Vict. c. 87, s. 28, amended by 60 & 61 Vict. c. 65, First Schedule.

(*p*) See note (*e*), p. 1120, above.

(*q*) Land Transfer Rules (1903), 166.

(*r*) Above, p. 1116, n. (*u*).

(*s*) Above, pp. 668, 694.

of discharge will generally be included in the instrument of transfer to the purchaser (*t*). Where the registered proprietor of a registered incumbrance or charge is willing to concur in a transfer on a sale by the registered proprietor of part of the land charged, without receiving any part of the purchase money (*u*), he must execute an instrument of discharge (*x*) to exonerate the land sold from the charge; and his certificate of incumbrance or charge must be produced (*y*). In such cases the transfer and the discharge will, as a rule, be included in one instrument.

Notices, cautions, inhibitions, restrictions.

Besides getting in all outstanding estates, interests or rights, which would not be conveyed or extinguished by a registered transfer, a purchaser of registered land must see that the vendor's title is not impeached or affected by any registered notices, cautions, inhibitions or restrictions. An inspection of the register will show whether any notices, cautions, inhibitions or restrictions (*z*) have been entered with respect to the land sold; and if there should be any such, the purchaser should require the vendor, in the case of cautions or inhibitions, to procure their removal from the register (*a*), and in the case of restrictions, either to procure their removal from the register or to procure the conditions imposed thereby to be complied with, as the circumstances of the case may require. In the case of notices, which are either of leases or agreements for leases, where the term granted is for or determinable on life, or exceeds twenty-one years, or where the occupation is not in accordance with the lease or agreement, or of estates in dower or by the curtesy, or of liens by deposit of the land certificate, what appears on a sale by open contract of land in possession is that the vendor cannot make a good title without the con-

(*t*) Above, p. 1121.

(*u*) Above, p. 598. It seems that in this case the purchaser may disregard any notice, which he may receive off the register, that the registered proprietor of the incumbrance or charge is a trustee; below, pp. 1132 *sq.*

(*x*) Above, p. 1120, and n. (*e*).

(*y*) Above, p. 1116, n. (*u*).

(*z*) See stat. 38 & 39 Vict. c. 87, ss. 53-59; Land Transfer Rules (1903), 223-242.

(*a*) The purchaser should not, it is thought, make any inquiry as to the interest of any person entitled to the benefit of a caution or an inhibition; he should simply require the same to be removed.

currence of some other person; and the purchaser should take the same course as he would adopt if similar facts were disclosed on the investigation of title to unregistered land. If the interest of the other person be such that the vendor is entitled, either absolutely or on the terms of paying him off, to direct him to concur in the conveyance to the purchaser, the purchaser should require the vendor to obtain such concurrence. If the vendor should have no such right to direct the other person to convey, the purchaser would be entitled to object to the title; but he might, instead of repudiating the contract, require the vendor to procure the other person's concurrence in the sale (*b*).

Production of the land certificate.

The purchaser of registered land must not only obtain the evidence to be afforded by inspection or certified copies of the register, but must also require the land certificate to be produced for the purpose of completing the transfer of the land sold to himself, for without this his own registration as proprietor of the land cannot be effected (*c*). Thus, although possession of the land certificate is no guarantee that the vendor is registered as proprietor of the land (*d*), its absence cannot be disregarded. The vendor may have created a lien on the land sold by depositing the land certificate as security for an advance (*e*); and notice of such a transaction need not, although it may (*f*), appear on the register. If the vendor should have so charged the land, the essential thing for the purchaser to secure is that the land certificate shall nevertheless be produced as above required, and the registered notice (if any) of the deposit withdrawn (*g*). If the chargee require the whole or any part of the purchase money to be paid to him as the condition of allowing this, the condition must of course be complied with: but if not, it appears that, provided the land certificate be produced and the registered notice withdrawn as aforesaid, the purchaser need not have regard to any notice (outside the register) which he may receive of the charge (*h*). And if a chargee by deposit of the land certificate should allow the same

Charge by deposit of the land certificate.

(*b*) See above, pp. 151-158, 177.
(*c*) Above, p. 1116, and n. (*u*).
(*d*) Above, p. 1118.
(*e*) See stat. 60 & 61 Vict. c. 65, s. 8 (4).
(*f*) See Land Transfer Rules (1903, 1907), 243-251; above, p. 1123.
(*g*) See Land Transfer Rules (1907), r. 250; above, p. 1123.
(*h*) See below, pp. 1132 *sq.*

to be produced and given up for the purpose of completing a registered transfer from the registered proprietor of the land, without insisting on being first paid off, it appears that he would be estopped from asserting any claim that he would otherwise have had to receive payment of the purchase money to such an extent as would be necessary to satisfy his charge (*i*).

Unregistered estates and interests in registered land.

Besides the estates and interests in registered land which will not be extinguished by a registered transfer, but of which the existence will be disclosed by the register, or should be disclosed by the vendor's declaration as to things declared not to be incumbrances (*k*), it is important to observe that registered land may be subject to all kinds of estates and interests, legal as well as equitable, which have been created by unregistered assurances or acts, and of which the existence will not be disclosed by the register. This is owing to the fact that under the Land Transfer Act, 1875 (*l*), *subject to the maintenance of the estate and right of the registered proprietor,* any person, whether the registered proprietor or not of any registered land, having a sufficient estate or interest in such land, may create estates, rights, interests and equities in the same manner as he might do if the land were not registered. Such estates, interests, rights or equities, may or may not be guarded by a notice, caution, inhibition or restriction (*m*) placed on the register by the person entitled thereto. Now it appears that, in the absence of special stipulation, a purchaser of registered land has no right to require an abstract or production of any instrument, by which the registered proprietor of land has created any estates or interests of this kind (*n*), except only of documents creating interests which are by the Acts declared not to be incumbrances (*o*). The sole protection of the pur-

Purchaser not entitled to an abstract of documents creating unregistered estates, except as to matters declared not to be incumbrances.

(*i*) The case is parallel to that of an equitable mortgagee by deposit of title deeds allowing the deeds to be handed over to a purchaser or subsequent mortgagee from the mortgagor; see *Perry Herrick* v. *Attwood,* 2 De G. & J. 21; *Briggs* v. *Jones,* L. R. 10 Eq. 92; *Brocklesby* v. *Temperance, &c. Bdg. Socy.,* 1895, A. C. 173; *Rimmer* v. *Webster,* 1902, 2 Ch. 163.

(*k*) Above, pp. 1113, 1117.

(*l*) Stat. 38 & 39 Vict. c. 87, s. 49; see *Capital & Counties Bank, Ld.* v. *Rhodes,* 1903, 1 Ch. 631; Wms. Real Prop. 711, 736, 23rd ed.

(*m*) Above, p. 1123.

(*n*) Above, pp. 1113 *sq.*

(*o*) Above, pp. 1113, 1117.

chaser against estates or interests so created, whether legal or equitable, lies, therefore, in the effect given by the statute to a registered transfer of the land made for valuable consideration by the registered proprietor thereof (*p*), coupled with the enactment that neither the registrar nor any person dealing with registered land or a charge shall be affected with notice of a trust, express, implied or constructive (*q*). Now such a transfer, when registered, of freehold land, confers on the transferee an estate in fee simple in the land free from *all estates and interests whatsoever*, except (1) registered incumbrances, (2) interests by the Acts declared not to be incumbrances (*r*), and (3) where the transferor was registered with a qualified or a possessory title only, such rights or interests as are not affected by such registration respectively; and similar registered transfers of leasehold land have a like effect (*s*). It appears, therefore, that if the registered proprietor of registered land make any unregistered disposition either of the legal or of the equitable estate therein, all estates or interests created by such disposition (except those declared not to be incumbrances) will be extinguished if he subsequently execute a transfer thereof for valuable consideration, and the same be duly registered (*t*). It follows that the assurance to be made by a vendor to a purchaser of registered land is not really a conveyance of the vendor's own estate, but is essentially the execution of a statutory power (*u*), resembling that conferred by the Settled Land Act, 1882 (*x*), and enabling the vendor to transfer an estate which is not or may not be his own (*y*). It should, however, be noted that a transfer for valuable consideration does not have this effect until it has been completed by registration of the transferee as proprietor of the land.

Extinguishment of unregistered estates by a registered transfer for value.

(*p*) Stat. 38 & 39 Vict. c. 87, ss. 30-32, 35; Land Transfer Rules (1903), 140-142.

(*q*) Stat. 60 & 61 Vict. c. 65, First Schedule, amending sect. 83 (1) of the Land Transfer Act, 1875.

(*r*) Above, p. 1113, n. (*o*).

(*s*) Above, pp. 1114, n. (*p*), 1115, nn. (*q*), (*r*).

(*t*) See Vaughan Williams, L. J., *A.-G.* v. *Odell*, 1906, 2 Ch. 47, 63, 64, 70-73.

(*u*) *Capital & Counties Bank, Ld.* v. *Rhodes*, 1903, 1 Ch. 631, 655.

(*x*) Above, p. 287.

(*y*) See Wms. Real Prop. 125, 437, 710, 714, 23rd ed. The transferee appears not to succeed to the estate or ownership of the transferor, but to have an entirely new title conferred upon him by an exercise of sovereign authority; compare the case of the purchase of a ship sold in Admiralty proceedings *in rem;* Wms. Pers. Prop. 49, 17th ed.

Prior to that time, the transferor is to be deemed to remain the proprietor of the land (*z*). This brings us to one of the most troublesome questions raised by the Acts: At what time and against what conveyance is a purchaser of registered land under an open contract bound to pay his purchase money?

At what time is a purchaser of registered land bound to pay the price under an open contract?

The time for completion is of course when the vendor has shown such a title as the purchaser is bound to accept (*a*). When this time has arrived, the parties are bound to perform their respective duties of conveyance and payment (*b*). But as a purchaser of registered land depends so entirely for his protection on the effect of the statutory *power* of transfer given to the registered proprietor, it seems obvious that he cannot safely pay his purchase money until that power is completely executed; and by the general law of sale of land he is not bound to part with the price, except against complete conveyance to himself of the whole estate purchased (*c*). This takes place, as we have seen, when the transfer is completed by his registration as proprietor of the land: but owing to the course of procedure laid down in the Land Transfer Rules, 1903, it is impossible for payment of the price and completion of the registration to be exactly simultaneous. The one must either precede or follow the other. In this respect the most important rules are the following:—

Time for completion.

(Rule 111.) Where instruments or applications are delivered at the registry with the proper Inland Revenue and Land Registry fee stamps affixed thereto or impressed thereon (*d*), accompanied when necessary by the land certificate or certificate of charge (*e*), they shall be examined by an officer of the registry, and if certified by him as capable of registration, they shall be entered in a book (*f*) in the order in which they are delivered. The registration shall then be completed *as of the day on which, and,* in the absence of direction or inference to the contrary in or from the instruments or applications themselves, *of the priority in which the instruments or applications were delivered.*

Relation back of registration to the time of delivery of the application therefor.

(Rule 118.) On the delivery for registration of an instrument or application, notice of the fact shall be sent to the person by whom it

Notice of application for registra-

(*z*) See stat. 38 & 39 Vict. c. 87, ss. 29, 30.
(*a*) Above, pp. 27, 543 *sq.*
(*b*) Above, p. 545.
(*c*) Above, pp. 372, 545, 685, 686, 688.
(*d*) See stat. 38 & 39 Vict. c. 87, s. 83 (7); Land Transfer Rules (1903), 123-125.
(*e*) See above, p. 1116, n. (*u*).
(*f*) This is called the Application Book.

tion to be sent to certain persons.

purports to be executed, and, where the instrument purports to be a conveyance or transfer in exercise of a power of sale contained either in a mortgage prior to the registration of the land or in a registered charge, notice of the fact shall also be sent to the proprietor of the land and to the proprietors of all subsequent charges.

The notice shall state that the person to whom it is addressed will have three clear days from the posting of the notice within which to lodge objections. In the absence of any objection the registration may be completed at the expiration of the limited period.

Priority notice.

(Rule 117.) The registered proprietor of land or of a charge or his solicitor, or with his consent in writing any other person or his solicitor, may lodge at the registry a notice (to be called a priority notice) in Form 19 in the First Schedule hereto reserving priority for a specified instrument or for a specified application intended to be subsequently made. The notice shall be accompanied by the land certificate or certificate of charge and shall be entered on the register and the certificate shall be endorsed accordingly. If within fourteen days from the lodging of the notice or such further time as the registrar shall think fit, the specified instrument or application is delivered for registration, it shall be registered *with priority to any other instrument or application affecting the same land or charge which may have been delivered in the meantime.* On the expiration of the period fixed, as aforesaid, for the operation of the notice, it may be cancelled.

Provisional registration.

(Rule 157.) (1) Upon the joint application in writing of the registered proprietor and of an intended purchaser of the whole or (*g*) part of the land comprised in a title, accompanied by an instrument of transfer (executed as or as in the nature of an escrow by all necessary parties), the intended transferee may be provisionally registered as proprietor; and in such case a land certificate may be issued to the transferor showing the intended transferee as registered proprietor of the land mentioned in the instrument of transfer; but nevertheless during a period to be specified in the application (but not exceeding twenty-one days from the date thereof) such registration shall, subject as hereinafter provided, be deemed to be provisional only, and liable to cancellation under this rule; and unless completed as hereinafter provided such registration shall not be deemed to be registration within the meaning of sections 29 and 34 of the Act of 1875.

(2) At any time before the registration has been completed, the provisional registration may be cancelled and the instrument of transfer returned to the transferor upon (i) the delivery of the land certificate to the registrar to be cancelled, and (ii) the production of a statutory declaration by the transferor to the effect that any consideration expressed to be paid or given for the transfer has not been paid or given, and (iii) the service of such notices as the registrar shall think fit.

(3) If such registration shall not have been cancelled then on the

(*g*) The words "the whole or" were added by the Rules of 1907, r. II., Weekly Notes, 24th Aug. 1907.

expiration of the period specified in the application (or sooner on the production of the land certificate accompanied by the written application of the transferee or any person claiming under him for the registration to be immediately completed) the registration shall be completed and take effect *as of the day on which and of the priority in which the application for provisional registration was delivered to the registry,* and the instrument of transfer shall be deemed to have taken effect accordingly.

(4) Pending the completion of the registration the registrar shall make such provisional entries in the books kept in the registry as he shall deem necessary.

Vendor not entitled to demand payment against the execution of an instrument of transfer.

Now it is thought that, under an open contract for the sale of registered land, the vendor can have no right to require the purchaser to pay the price at the office of the vendor's solicitors on receipt of an instrument of transfer executed by the vendor (*h*). Such an instrument, unless it contain words sufficiently evidencing an intention to grant the estate, as well as to execute the statutory power, vests no estate at all in the purchaser prior to his registration as proprietor of the land (*i*). And if between the time of payment of the purchase money and that of the delivery of his transfer for registration, application were made at the registry for the registration of some other disposition by the vendor, capable of registration, or of an inhibition or a restriction, it appears that the transfer to the purchaser would be postponed to the result of those prior applications. And this would equally be the case, although the transfer had contained a conveyance of the vendor's legal estate to the purchaser. It is thought that the vendor cannot

(*h*) It is submitted that the case is not parallel to that of the conveyance of land in a register county; see above, pp. 371, n. (*s*), 685, 686.

(*i*) It is submitted that the execution of an instrument of transfer is a mere step in the execution of the statutory power; and that, applying the ordinary rules with regard to the construction of instruments, which may operate either as an execution of a power or as a grant of an estate (see above, p. 511, n. (*d*)), an instrument of transfer in Form No. 20 in the First Schedule to the Land Transfer Rules, 1903, merely exhibits an intention to execute the statutory power, and does not show any intention of granting the transferor's estate; unless words indicative of an intention to grant the estate be added thereto. The fact that the form in question contains no words of inheritance is thought to confirm this view. If words of inheritance alone should be added to the form, the question would be raised whether this showed an intention to grant the estate: but these words would hardly be conclusive. Where it is desired to include a conveyance of the transferor's estate in a registered transfer, express words of grant should be added, as well as the appropriate words of inheritance.

require the purchaser to run these risks, however improbable it may be that he will incur any actual harm in the short interval between payment and registration. There appear, however, to be four ways in which the risk of adverse entries in the register, made subsequently to payment, may be avoided.

Completion at the Office of Land Registry.

First, the purchase may be completed at the Office of Land Registry, the purchaser ascertaining there that no entries or applications adverse to his interest have been made up to the last moment, and paying his purchase money when the draft entries to be made in the register have been approved by the proper officer and the necessary documents are handed over to the clerk in charge of the Application Book (*j*). If this be done, it appears that his registration as proprietor, when completed, will relate back to the time of handing over the documents, that is, the time of payment (*k*). Secondly, the vendor may obtain a priority notice in favour of the transfer to the purchaser; in which case it appears that the purchaser may safely pay his purchase money, away from the Land Registry, against delivery to him of an instrument of transfer duly executed by the vendor and all other necessary parties, if any, and of the land certificate endorsed with the priority notice, provided that fourteen days from the lodging of the notice have not expired. In such case it appears that the registration, when completed, will relate back to the time of lodging the notice (*l*). Thirdly, where the land sold was either the whole or part of that comprised in the vendor's title, the vendor and purchaser together may obtain provisional registration of the purchaser as proprietor of the land; when the purchaser may, it seems, safely pay the price on delivery to him of the land certificate made out in his name, provided that twenty-one days from the date thereof have not expired. If he obtain this, he can procure his own registration to be immediately completed, when it will relate back to the time of the application for provisional registration (*m*). Fourthly, the transfer may be registered (not provisionally) and the purchase money not paid over to the vendor until the land certificate made out in the purchaser's name has been issued.

Priority notice.

Provisional registration.

Complete registration before payment.

(*j*) See Brickdale & Sheldon's Land Transfer Acts, 402, 2nd ed.
(*k*) Above, p. 1127.
(*l*) See above, p. 1128.
(*m*) Above, p. 1129.

As to requiring complete registration before payment.

Now the last of these methods of completion is obviously that most favourable to the purchaser: for he would not part with his purchase money until after the legal estate had been vested in him by the complete execution of the statutory power, and it had been ascertained that no objection to the registration of his transfer could be lodged by any person to whom notice of his application is required to be sent (*n*). But such registration would irrevocably vest the purchased estate in the buyer before the land certificate in his name was issued (*n*); and it appears that, in the ordinary course of procedure, the land certificate would be issued to the *purchaser*. It is thought that he has no right to require this to be done before payment (*o*). It seems, therefore, that this method of completion cannot be that contemplated by an open contract (*p*). Nor can it be implied in such a contract that the purchaser shall, on the execution or on delivery for registration of the instrument of transfer, deposit the purchase money with a stakeholder, to be paid over to the vendor on the issue to the purchaser of the land certificate made out in his name (*q*). We are therefore driven to conclude that one of the first three methods of completion above mentioned must be that to which the parties are bound under an open contract: but in the absence of any expression of judicial opinion on the matter, it is impossible to say which. It is suggested, however, that the vendor may be entitled to object to the first of them on the ground that he cannot be required, against his will, to complete at the Land

(*n*) See above, pp. 1127, 1128.

(*o*) Above, pp. 545, 546.

(*p*) It is thought that the purchaser has no right to claim to complete in this manner, merely because of the notices required to be sent out of his application for registration and of the time given for lodging objections thereunder; above, pp. 1127, 1128. As to notice to the transferor, that appears to be simply a precaution against forgery; and the risk of forgery is run on the completion of every sale of land. As to the notices, on the purchase from a mortgagee or chargee, to the persons entitled to redeem, the purchaser must of course ascertain that all these persons will be bound by the sale before he accepts the title; and having accepted it, he appears to be bound to complete, notwithstanding these notices.

(*q*) See above, pp. 27, 546. This course may be adopted by express stipulation where the purchase is by private contract. It is that which affords the greatest security to the purchaser, particularly where he is buying from a chargee under an exercise of the chargee's power of sale; as the purchase money is not handed over to the vendor until it has been finally ascertained that no person to whom notice is required to be sent can raise any objection to the purchaser's registration as proprietor of the land sold.

Registry (*r*); and the purchaser on the ground that a priority notice or provisional registration secures to him the assurance that notice of the application therefor has been sent out to the persons specified in the Rules, and no objection has been lodged in consequence. If so, it is thought that since provisional registration is now possible in every case, the vendor would have to give to the purchaser the choice of the other two alternatives. It can make no difference to the vendor which method of completion is adopted; in any case the whole expense of the purchaser's registration appears to form an item of the expense of the conveyance to the purchaser and so to fall upon the purchaser himself (*s*). But of course, where a formal contract is made or where registered land is sold by auction, the place and manner of completion should be the subject of express stipulation (*t*).

Is the purchaser bound to have regard to notice given to him of unregistered interests?

The next point to be considered is whether a purchaser of registered land, who before completion receives notice of some unregistered estate, interest or equity, adverse to the vendor's registered estate, is bound to have regard thereto. It is submitted that he is not; that the effect of the enactments and rules above cited (*u*) is that priority of interest is to be determined by priority of registration alone, and that, so long as the persons claiming the unregistered interests do not protect themselves by a registered caution, notice, inhibition or restriction (*x*),

The proper place for completion of a sale of land.

(*r*) It does not appear to have been precisely decided what is the proper place for completion of an open contract for sale of land. The purchaser is, however, bound to tender the conveyance for the vendor's execution, together with the price; above, pp. 34, 545. He must therefore go to the vendor, who is not bound to come to him; see Litt. s. 340; Co. Litt. 210 a, b. It is thought that the vendor may well appoint his own residence, or his solicitor's office, or on or near the land sold, or a convenient place in London, as the place for completion; see above, pp. 113, 688; but it would be a breach of duty for the vendor to be out of the country at the proper time for completion; *Re Young and Harston's contract*, 31 Ch. D. 174 (above, p. 62, n. (*a*)).

(*s*) See above, pp. 686, 688. Of course, the vendor must bear the expense of the execution by himself and all other necessary parties of the instrument of transfer or of otherwise clearing the register of incumbrances, or of getting in or releasing things declared not to be incumbrances or outstanding estates or interests not affected by registration; see above, pp. 1117, 1119.

(*t*) See above, p. 1131, n. (*q*).

(*u*) Above, pp. 1125, 1127.

(*x*) Above, p. 1123. It is thought that persons entitled to any unregistered estates or interests in registered land who do not protect themselves by such entries in the register as are available in and

anyone dealing with registered land in such a way that he is about to become registered as the proprietor or a chargee thereof (*y*) is entitled, if he can, to gain priority of interest by procuring priority of registration, notwithstanding that he have notice, actual or constructive, of any unregistered interest whatsoever (*z*). And it is thought that if he so procure himself to be registered as proprietor of the land or a charge thereon, the adverse unregistered estates or interests will be extinguished, or will be postponed to the charge; and he will not be held to be a trustee of any legal estate or interest so acquired by him. It must be observed, however, that the Land Transfer Acts only provide that persons dealing with registered land or charges shall not be affected with notice of a *trust* (*a*); and that the effect of a registered transfer of registered freehold land is to vest in the transferee an estate in fee simple free from all *estates and interests* whatsoever other than those excluded from the effect of the registration (*b*).

Notice of a bare right or equity.

The question is thus raised, what is the position of a person dealing with registered land, who receives notice of a bare right or equity, not amounting to an *interest* (strictly so called) in the land, such as the right to set aside a prior conveyance thereof induced by fraud, duress or undue influence (*c*), or by the concealment of some relative equitable disability? (*d*) Notice of such a right is no doubt notice of a trust to this extent,

appropriate to the particular case, but allow the registered proprietor to remain the apparent owner on the register, with unrestricted statutory powers of disposition, will be estopped from otherwise asserting their claims against persons taking under an exercise of any of such powers; see above, p. 1125, and n. (*i*). Consider also stat. 60 & 61 Vict. c. 65, s. 7 (3).

(*y*) It is thought that the provisions of the Land Transfer Acts as to notice (see above, p. 1126) would not be construed so as to absolve persons acquiring *unregistered* legal estates in registered land from the effect of notice of equities.

(*z*) See Cozens-Hardy, L. J., *Capital and Counties Bank, Ld.* v. *Rhodes,* 1903, 1 Ch. 631, 655, 656; and consider *Black* v. *Williams,* 1895, 1 Ch. 408, 421, decided on the Merchant Shipping Acts, 1854 and 1862, the language of which appears to be no stronger than, if so strong as, that of the Land Transfer Acts and Rules; *Barclay & Co., Ld.* v. *Poole,* 1907, 2 Ch. 284, decided under the Merchant Shipping Act, 1894; but cf. 2nd Rep. (1911) of Land Transfer Commissioners, § 79.

(*a*) Above, p. 1126.
(*b*) Above, pp. 1114, and n. (*p*), 1115, nn. (*q*), (*r*), 1126.
(*c*) Above, pp. 812, 829.
(*d*) Above, pp. 961, 962.

that it is notice that the person claiming under the conveyance is constructively a trustee for the person entitled to set it aside; and it is submitted that a person, so dealing with registered land as to be in the way of becoming the registered proprietor thereof or of a charge thereon, should not be affected by notice of such a trust, so long as the other refrains from asserting his right by registered inhibition or caution. Indeed, as the other's right is to set aside or affirm the conveyance at his election (*e*), it may be suggested that to refrain from procuring an inhibition or registering a caution, when informed of the proposed dealing with the land, is evidence of an intention to affirm the conveyance (*e*). Besides this, it is thought that the unregistered interests in registered land, which are extinguished by the registration of a transfer thereof for valuable consideration, are *interests* in the widest sense of the word and include, not only all bare rights of entry on or action to recover the land (*f*), but also all bare rights of action in equity to set aside a conveyance thereof for fraud or other cause (*g*). It seems, therefore, that a purchaser of registered land need have no more regard to notice of equities of this description than to notice of express trusts. It is submitted, however, that an intending purchaser or mortgagee of registered land cannot safely assume more than this:—that where, by the equitable rule of notice it would be merely a *technical* fraud in equity (*h*) to act in disregard of notice acquired of some unregistered estate or interest, he is at liberty, if he can, to acquire priority of interest by priority of registration. Thus, if the registered proprietor of registered land had made a settlement or an unregistered mortgage thereof, and the settlement or mortgage were not in any way protected on the register, it is thought that a person intending to take a registered transfer or charge of the land need not have regard to any notice which he may receive of the settlement or unregistered mortgage, so long as the persons claiming thereunder refrain from asserting their interests by some entry in the register (*i*). But where the

(*e*) Above, pp. 809, 810, 830.
(*f*) See Co. Litt. 345 b.
(*g*) See *Gresley* v. *Mousley*, 4 De G. & J. 78, 93.
(*h*) That is, the kind of fraud which Courts of Equity held to be committed when a purchaser or mortgagee of land in a register county registered his conveyance in priority to some previous assurance, of which he had notice; above, p. 362, n. (*q*).
(*i*) See above, pp. 1125, n. (*i*), 1126, 1133, n. (*y*); and *Battison* v. *Hobson*, 1896, 2 Ch. 403, 412.

unregistered right is not the consequence of some prior unregistered *disposition* by the registered proprietor, but is an equity arising from his actually fraudulent or blameworthy conduct (as in the case of a right to set aside the conveyance to himself for his fraud or undue influence), or where the intending purchaser has notice of facts showing that the registered proprietor is contemplating an actual fraud to the detriment of some person entitled to an unregistered interest, it is thought that the wording of the Acts is not so clear that the purchaser could be advised to act in disregard of the notice, without obtaining the direction of the Court.

Can a vendor of registered land enforce the contract where there are unregistered estates or interests outstanding in other persons?

It should be observed that in any case where it appears from information furnished by the vendor, or obtained elsewhere, that the registered proprietor of registered land is a trustee for some other person, without power of sale (*k*), or has created or is subject to any unregistered estate, interest or equity, adverse to his own registered proprietorship, it is questionable whether he is in a position to enforce, either specifically or at law, a contract made by himself alone for sale of the land; for he has not shown what is requisite to establish a good title (*l*). The vendor may indeed allege that he has an over-riding statutory power of disposition, which is paramount to all unregistered interests (*m*); but he can only exercise this power to the prejudice of unregistered rights by a registered transfer *for value* or charge (*n*); and the question is whether he is enabled of his own motion so to put an end to unregistered estates, which may have been created by his own act and for value. The Court may possibly hold that the case is parallel to that of a sale, under the old law, of land which the vendor had already parted with by some voluntary conveyance (*o*); and that the Court will not interfere to assist the vendor to get rid, by registration of a transfer or charge from himself, of any lawful estates or interests which would otherwise remain perfectly valid. But if this should be so decided, it is thought that,

(*k*) Above, p. 241.
(*l*) Above, pp. 151-158.
(*m*) Above, p. 1126, n. (*y*).
(*n*) Transfers made without valuable consideration are subject, so far as the transferee is concerned, to any unregistered estates, rights, interests or equities, subject to which the transferor held the same; stat. 38 & 39 Vict. c. 87, ss. 33, 38.
(*o*) Above, p. 378, n. (*d*).

as in the parallel instance (*o*), the *purchaser* would be entitled to enforce the contract in every case where the unregistered estate, interest or equity would be extinguished or defeated by the registration of a transfer from the registered proprietor to himself (*p*). If this suggestion be correct, a purchaser of registered land who had received notice of unregistered estates or interests adverse to the vendor's title, would have two courses open to him:—He might object to the title, and refuse to complete except with the concurrence of all persons entitled to the unregistered interests (*q*); or, if the unregistered interests were such as would be extinguished by the transfer to himself and remained unprotected on the register, he might proceed with his purchase (*r*).

Restrictive conditions.

Under the Land Transfer Acts (*s*), any conditions restrictive of the use of land—such as are capable of affecting assigns by way of notice (*t*)—may be entered in the register. It is submitted that, unless such restrictive conditions be so entered in the register, or come under the head of rights or interests exempted from the effect of registration with a qualified, good leasehold or possessory title (*u*), a purchaser of registered land need pay no regard to any notice he may receive of the existence or creation of such conditions (*x*).

Searches on purchase of registered land.

We see, then, that a purchaser of registered land is in effect relegated to the ordinary methods of investigation of title as regards any estates or interests which come under the description of (1) registered incumbrances prior to first registration,

(*o*) See note (*o*), previous page.

(*p*) The vendor could not raise the defence of want of mutuality if the purchaser sued for specific performance of the agreement; above, pp. 1063, 1064; nor, it is thought, could he raise the defence of a superior equity (above, p. 1062); for the Land Transfer Acts appear to subject the estates and interests created by unregistered disposition to the estate created by the statutory power of disposition given to the registered proprietor; stat. 38 & 39 Vict. c. 87, s. 49; *Capital and Counties Bank* v. *Rhodes*, 1903, 1 Ch. 631, 655, 656; Vaughan Williams, L. J., *A.-G.* v. *Odell*, 1906, 2 Ch. 47, 63, 64, 70-73.

(*q*) See above, pp. 151-158, 177.

(*r*) Above, pp. 1132 *sq.*

(*s*) Stat. 38 & 39 Vict. c. 87, s. 84, amended by 60 & 61 Vict. c. 65, First Schedule; Land Transfer Rules (1908), I. 43; (1903), 223.

(*t*) Above, pp. 467 *sq.*

(*u*) Above, p. 1115, nn. (*q*), (*r*).

(*x*) Above, pp. 1132 *sq.*

whereof the proprietorship is not registered (*y*); (2) matters declared by the Acts not to be incumbrances; or (3) estates or interests exempted from the effect of registration with a qualified, good leasehold or possessory title (*z*); but that, except in respect of these estates or interests, his security lies in the inspection of the register and in the effect given by the Acts to a registered transfer for valuable consideration (*a*). If the land purchased be subject to any estates or interests of the second or third kind (*b*), the purchaser must make the same searches in respect thereof as would be necessary on a purchase of unregistered land, according to the circumstances of the case (*c*). But except in these respects—that is to say, as regards the estate which will be vested in the purchaser by the registration of the transfer to him—it is a question whether he need make any searches outside the Land Register; for it may be contended that all such interests as are guarded against by searches on the sale of unregistered land will be extinguished, in the case of registered land, by the effect of a registered transfer for valuable consideration (*d*). Thus it is thought that all annuities (other than land charges) would be so extinguished, if not entered in the Land Register (*e*). And it may be argued that the charge obtained by the registration of a writ or an order enforcing a judgment or Crown debt against the land (*f*), any claim asserted by a registered *lis pendens* (*g*), and all land charges not registered in the Land Register (*h*), would equally be defeated in

Annuities.

Judgment creditor's charge.

Lis pendens.

Land charges.

(*y*) Above p. 1122.

(*z*) Above, pp. 1115, nn. (*q*), (*r*), 1117, 1119.

(*a*) Above, pp. 1117, 1126.

(*b*) With respect to any registered incumbrances prior to first registration, all that is necessary appears to be that they shall be cleared off the register; after which the registered transfer to the purchaser will have full effect; above, pp. 1119-1123.

(*c*) Above, pp. 547-575.

(*d*) Above, pp. 1114, n. (*p*), 1115, nn. (*q*), (*r*). This view was maintained in the first edition of this book, except as regards search in Bankruptcy.

(*e*) Above, p. 554. Annuities charged on registered land may be registered as charges thereon; stat. 60 & 61 Vict. c. 65, s. 9 (3); Land Transfer Rules (1903), 160.

(*f*) Above, pp. 548-554, 563.

(*g*) See above, pp. 559, 560, 563. It has been admitted (above, p. 1134) that the *interests*, which may be extinguished by the registration of a transfer for value of registered land, may well include bare rights of action to recover or of suit affecting the land.

(*h*) Above, pp. 419, and n. (*a*), 555-559, 564. Under the Land Transfer Rules (1903), 1 (3), 170, all land charges, as defined therein, are capable of registration, and the definition given not only includes land charges as defined in the Land Charges Act, 1888, but extends

this way, unless they should have been protected by a registered caution, inhibition or restriction (*i*). But doubts have lately been cast (*j*) on the extinguishing effect of a registered transfer for valuable consideration upon land charges and upon interests or claims protected by writs and orders affecting land, when registered under the Land Charges Act, 1900 (*k*), or by registered *lis pendens*. In consequence of these doubts it appears to be equally advisable to search for writs and orders affecting land, for *lis pendens*, and (where necessary) for land charges, upon the sale of registered land as when the land purchased is unregistered (*l*). So also search in bankruptcy may possibly not be necessary on the sale of registered land: but it is thought to be advisable to make the same search in bankruptcy against the vendor's name as if the land were not registered (*m*).

Searches advisable.

Bankruptcy.

The search in the Land Register.

In searching the Land Register, a purchaser of registered land should examine the Property, Proprietorship and Charges Registers (*n*), the filed plan, if any, of the land registered (*o*), or if there be no filed plan, the General Map and the Parcels Book (*p*), and (in every case) the list of pending applications, and the Day List (*q*). As we have seen (*r*), the purchaser may either search the register himself or procure an official search

to all rents or annuities or principal moneys charged on land in the manner mentioned in that Act, *whether upon the application of any person or not*. This appears to comprehend charges so imposed on land against the owner's will, as under sect. 257 of the Public Health Act, 1875, or the Private Street Works Act, 1892; see above, pp. 166, 167, 419, n. (*a*), 497, 558, 559.

(*i*) See above, pp. 1123, 1132, and n. (*x*), 1133.

(*j*) See Appendix to 1st Rep. (1909) of Land Transfer Commrs., Minutes of Evidence, Q. 2041-2046; 2nd Rep. (1911), §§ 76, 77.

(*k*) See note (*f*), p. 1137, above.

(*l*) See above, pp. 563, 564.

(*m*) Above, pp. 560-562. The reasons for this opinion are given in Appendix (D), below. See 2nd Rep. (1911) of Land Transfer Commrs., § 77.

(*n*) See Land Transfer Rules (1903), 2-11, 284.

(*o*) Ibid. Rules 2, 269-282, 285; and next note.

(*p*) See Land Transfer Rules (1907), V. r. 269A, providing for a series of maps to be prepared, with parcels numbered for reference, and kept in the Registry and called the Land Registry General Map; r. 269B, as to the Parcels Book, containing the reference numbers of the parcels shown on the General Map; r. 270, allowing the land comprised in a title to be described either by means of the relative parcel number on the General Map, or by means of a separate filed plan.

(*q*) Ibid. Rule 13; Brickdale & Sheldon's Land Transfer Acts, 37, 2nd ed.

(*r*) Above, p. 1117.

to be made and an official certificate of the result of the search to be issued (*s*). This search should be made up to the last minute before the application is handed in for a priority notice or for provisional registration in order to complete the purchase (*t*); so that it may be ascertained that no application is pending which may possibly take priority over the transfer to the purchaser. If the purchase is to be completed at the Land Registry without a priority notice or provisional registration (*u*), or is to be completed by securing the purchaser's final registration before payment of the price (*v*), the search should be made up to the time of delivery of the application for the purchaser's registration.

Inquiries.

On every sale of registered land, the purchaser must make the same inquiries as are necessary on the sale of unregistered land (*x*) to ascertain that the possession or enjoyment of the land is in accordance with the title shown. For the land might be subject to some tenancy, easement or right which is not disclosed by the contract, and is amongst the things declared not to be incumbrances (*y*). It is thought that if the result of these inquiries be to ascertain the existence of some unregistered interest in the land (*z*), which would be extinguished by the registration of a transfer to the purchaser (such as a prior contract of sale or a right of pre-emption), he may nevertheless proceed with his own purchase, so long as the person entitled to the unregistered interest refrains from asserting the same by some entry in the register (*a*). Owing to the doubt above mentioned (*b*), whether unregistered land charges of any kind are extinguished by the effect of a registered transfer for valuable

Land charges.

(*s*) By the Land Transfer Rules (1903), 293, where a solicitor or other person obtains an official certificate of the result of the search, he shall not be answerable in respect of loss that may arise from any error therein. When the certificate is obtained by a solicitor acting for trustees, executors or other persons in a fiduciary position, those persons also shall not be so answerable.

(*t*) Above, pp. 1131, 1132.

(*u*) Above, p. 1130.

(*v*) Above, p. 1130.

(*x*) Above, pp. 572-576.

(*y*) Above, p. 1113, n. (*o*).

(*z*) Above, p. 574.

(*a*) See above, pp. 1132 *sq.*

(*b*) Above, p. 1138.

consideration, the same inquiries should be made respecting such charges as upon the sale of unregistered land (*c*).

Succession and estate duty charged on registered land.

A purchaser of registered land need make no inquiries with respect to any succession or estate duty, which may be charged thereon; except as regards things declared not to be incumbrances, and estates or interests exempted from the effect of registration with a qualified or possessory title (*d*), as to which he must observe the same precautions as are incumbent on the purchase of unregistered land (*e*). For by the Land Transfer Act, 1897 (*f*), succession duty and estate duty shall not affect a *bonâ fide* registered purchaser (*g*) for full consideration in money or money's worth, although he may have received extraneous notice of the liability in respect thereof, unless (1) the liability be noted in the register (*h*), or (2) in the case of a possessory title the liability to the duty were at the date of the original registration of the land, subsisting or capable of arising, or (3) in the case of a qualified title the liability to the duty were included in the exceptions made on such original registration of the land. Of course, where any such liability is noted in the register, it must be discharged.

Purchaser should lodge a caution.

A purchaser of registered land is advised to lodge a caution in the Land Registry (*i*) immediately on signing the contract of sale. This will ensure that no registered disposition of the land shall be made to his prejudice before completion, without his being informed of it and having an opportunity of procuring an inhibition to restrain it (*j*).

(*c*) See above, pp. 166, 167, 419, and n. (*a*), 557-559, 572-574.

(*d*) Above, pp. 1113, n. (*o*), 1115, nn. (*q*), (*r*).

(*e*) Above, p. 162; below, pp. 1193 *sq.*

(*f*) Stat. 60 & 61 Vict. c. 65, s. 13 (3).

(*g*) It is presumed that the registered proprietor of a registered charge would be held to be a purchaser to the extent of the charge.

(*h*) By sub-sects. 1, 2, on every application to register land with an absolute title, or to register a transmission of land, the registrar shall inquire as to succession duty and estate duty. And if, on such application, it appears that there is, or is capable of arising, any such liability to succession duty or estate duty as would affect the purchaser from the person to be registered as proprietor, if the land were unregistered, the registrar shall enter notice of the liability on the register in the prescribed manner. See Land Transfer Rules (1903), 208-211.

(*i*) Above, p. 1123, and n. (*z*).

(*j*) See stat. 38 & 39 Vict. c. 87, ss. 53-57; Land Transfer Rules (1903), 226-241.

Transfer of registered land, how effected.

A transfer of registered land is effected by the execution of an instrument of transfer in the prescribed form, followed by registration of the transferee as proprietor of the land (*k*). The instrument of transfer is required to be executed as a deed in the presence of and attested by a witness, who must sign his name and add his address and description (*l*). It must, of course, be executed by the registered proprietor in person or by attorney (*m*); but except where an entry has to be made in the register in derogation of the estate passing to the transferee, as in the case of a sale subject to restrictive conditions (*n*), it need not be executed by the transferee. As already mentioned (*o*), it is thought that a simple instrument of transfer in the form given in the Land Transfer Rules, 1903 (*p*), operates by way of execution of the statutory power of transfer and not of grant of the registered proprietor's estate. It is, however, usual, *ex abundanti cautelâ*, to insert in the instrument of transfer words of grant of the estate (*q*), in order that the transferee may at least obtain the unregistered legal estate at the time of payment of the purchase money. And there seems to be no objection to this, although the purchaser's real protection lies in the effect given by the Acts to the transfer completed by registration (*r*); and he should not part with his purchase money until satisfied that the statutory legal estate, to be conferred on him by his registration as proprietor, will vest in him by relation back as from the time of payment (*s*).

Whether any other assurance than a registered transfer is required.

Where the title to the whole estate purchased appears completely on the register, it seems quite unnecessary to supplement the instrument of transfer by any separate assurance of the land. This is the case where the vendor is registered as proprietor with an absolute title, and there are no estates or

(*k*) Stat. 38 & 39 Vict. c. 87, ss. 29-39; Land Transfer Rules (1903), 97-157, 182.

(*l*) Land Transfer Rules (1903), 107-110.

(*m*) See above, p. 692; and see Land Transfer Rules (1903), 110, requiring the power of attorney, or an office copy thereof, to be produced to the registrar, and the original power to be filed in the Central Office or the Land Registry.

(*n*) Above, p. 1136; Land Transfer Rules (1903), 153; and First Schedule, Form 41.

(*o*) Above, p. 1129, n. (*i*).

(*p*) First Schedule, Forms 20 *sq.*

(*q*) See above, p. 1129, n. (*i*).

(*r*) Above, pp. 1125, 1126.

(*s*) Above, pp. 1127-1132.

interests to be assured to the purchaser which are among the things declared not to be incumbrances (*t*); also where in the like case there are no other interests to be got in than registered incumbrances prior to first registration whereof the proprietorship has been registered, or registered charges created subsequently to registration (*u*). Where the registered proprietor of any registered incumbrance or charge executes an instrument of discharge, whether contained in a separate document or included in the instrument of transfer (*x*), words may be added assuring all his estate to the purchaser: but this is also of excess of caution rather than of necessity. For although an incumbrance prior to registration will generally have been a mortgage of the land, whilst unregistered, in the usual form (*y*), and although registered charges subsequent to registration are very commonly accompanied by an unregistered mortgage of the proprietor's estate, it appears that, when the registered incumbrance or charge has been cleared off the register, any outstanding legal estate will be extinguished upon the completion by registration of the transfer to the purchaser (*z*). And as such transfer, when registered, appears to confer on the purchaser (in the case of freeholds) an unincumbered fee simple by a new title depending on an act of sovereignty and not upon the extent of the vendor's own estate (*a*), there does not seem to be the same necessity as exists in the case of unregistered land for taking care that any outstanding legal estate shall be assured direct to the purchaser (*b*). Where the vendor is registered with an absolute title, but there are registered incumbrances prior to first registration, whereof the proprietorship has not been registered, we have seen (*c*) that the title must be investigated in the same manner as if the land were not registered, and the purchaser must obtain satisfactory proof that the incumbrances have been discharged. In such case the proper course (*d*) appears to be to require that the

(*t*) Above, p. 1113.
(*u*) Above, pp. 1119-1122.
(*x*) Above, pp. 1119-1122.
(*y*) Above, pp. 1120, 1122.
(*z*) Above, pp. 1121, 1126.
(*a*) Above, p. 1126, and n. (*y*).
(*b*) Above, p. 587.
(*c*) Above, p. 1122.
(*d*) This course is advised because the execution of such a deed affords the best evidence of the discharge of the incumbrance; but so long as the required proof is obtained that the charge has been

persons in whom the incumbrances are presently vested shall execute a separate deed of reconveyance to the *purchaser*, as is usual on sales of unregistered land (*e*), and that the vendor shall concur therein to direct and confirm such assurance. It is thought that in this conveyance the incumbrancers would be bound to give the usual covenant that they have done no act to incumber (*f*), but that, in the absence of special stipulation, the vendor could not be required to covenant for title (*g*).

Sale of land registered with a qualified title.

Where the land sold is registered with a qualified title (*h*), the purchaser, under an open contract, has not only to satisfy himself that he will obtain a transfer of the estate free from registered incumbrances and things declared not to be incumbrances (*i*), but he must also investigate, in the same manner as if the land were not registered, the title to the right or interest appearing by the register to be excepted from the effect of registration (*k*); and he must obtain a proper assurance of that right or interest to himself from the person or persons in whom the same is ascertained to be presently vested. It is thought that such assurance should be made by a deed separate from the instrument of transfer, and that the vendor should concur therein to direct and confirm the conveyance thereby made, and to enter into the appropriate covenants for title (*l*).

Sale of land registered with a possessory title only.

Where land registered with a possessory title (*m*) is sold under an open contract, the purchaser, besides seeing that he will obtain the estate purchased clear of registered incumbrances (*n*) and things declared not to be incumbrances (*o*), must ascertain, by investigation of the title in the same manner as if the land were not registered, whether any right or interest adverse to or in derogation of the title of the first registered

paid off, there is no *necessity* for a reconveyance of the legal estate which may be left to be extinguished by the operation of the transfer to the purchaser; above, pp. 1120, 1121, 1126.

(*e*) Above, p. 587.

(*f*) Above, pp. 614, 615, 617.

(*g*) Above, p. 1115.

(*h*) Above, p. 1115, and n. (*q*).

(*i*) Above, pp. 1119, 1137.

(*k*) See stat. 38 & 39 Vict. c. 87, ss. 30, 31, 35; Land Transfer Rules (1903), 140-142.

(*l*) Above, p. 1115.

(*m*) Above, p. 1115, n. (*r*).

(*n*) Above, pp. 1119-1123.

(*o*) Above, p. 1113, and n. (*o*).

proprietor was subsisting or capable of arising at the time of the registration of such proprietor (*p*). He must, in fact, consider whether the first registered proprietor was entitled to be registered with an absolute title. If any such right or interest were then subsisting or capable of arising, the subsequent title thereto must be deduced in the same manner as if the land were not registered; and the same must be duly assured to the purchaser by the person or persons, in whom it is ascertained to be presently vested. Such assurance should, it is thought, be made by deed separate from the instrument of transfer, and the vendor should concur therein to direct and confirm the conveyance to the purchaser and to give the appropriate covenants for title (*q*). If it be ascertained that no such right or interest as aforesaid was at the time of first registration subsisting or capable of arising, there would not appear to be any strict necessity for the purchaser to take an assurance of the vendor's estate as well as to obtain the due execution of his statutory power of transfer; for such assurance could vest in the purchaser no larger estate than, if so large an estate as, the statutory transfer (*r*). At the same time a vendor registered with a possessory title has only a limited and not an unqualified power of transfer; he is not absolutely empowered to dispose of the whole estate in the registered land (*r*). It appears proper, therefore, to supplement the transfer by a grant or an assignment of the fee simple or term contracted to be sold; and the more so as the vendor is bound to give covenants for title as against estates or interests excluded from the effect of registration (*s*). And for the reasons given below, it is thought that this assurance of the vendor's estate should be contained in a deed separate from the instrument of transfer, the appropriate covenants for title being included therein.

As to inserting in an instrument of

With respect to the question of inserting in an instrument of transfer any other provisions than those necessary to exercise

(*p*) See stat. 38 & 39 Vict. c. 87, ss. 30, 32, 35; Land Transfer Rules (1903), 140, 142.

(*q*) Above, pp. 1115, 1119, 1136.

(*r*) See above, p. 1126. If the whole fee simple be *in* the vendor, the purchaser will obtain the like estate on registration of the transfer to himself, but by a new statutory title; and if there be any outstanding estate or right adverse to the vendor's interest, it would not pass by any direct conveyance that he could make.

(*s*) Above, p. 1115.

the statutory *power* of transfer (*t*), the conveyancer must recollect that as a rule all documents (including such instruments) on which any entry in the register is founded are to be retained in the Land Registry, and are not to be taken away therefrom except under a written order of the registrar or an order of the Court (*u*). And the principle of the system of registration of title introduced by the Land Transfer Acts appears to be that the entries in the register, when made, supersede the instruments on which the entries are founded (*x*). Office copies of such documents may be issued (*y*), but are not made evidence by the Acts or Rules (*z*). It is thought, therefore, that an instrument of transfer should as a rule be confined to such provisions as will confer on the transferee the right to have the required entry in the register made in his favour (*a*). If a contract for the sale of registered land contain any other stipulations than those necessary to secure the purchaser's registration as proprietor of the land, effect should be given to those stipulations by a separate deed which the purchaser can retain in his own custody, ready to be produced whenever necessary in support of his rights, without any application being made to the registrar or the Court. Thus, where the vendor of registered land gives any covenants for title or against incumbrances (*b*), such covenants should be contained in a separate deed, and not in the instrument of transfer (*c*).

transfer matters extraneous to the transferee's registration.

The form of instrument of transfer given in the Land Transfer Rules, 1903 (*d*), does not show to whom or by whom

Receipt clause should be inserted

(*t*) Above, pp. 1126, 1129.
(*u*) Land Transfer Rules (1903), 119.
(*x*) See above, pp. 1112, n. (*c*), 1125.
(*y*) Land Transfer Rules (1903), 294.
(*z*) By stat. 38 & 39 Vict. c. 87, s. 80, any land certificate or certificate of charge shall be *primâ facie* evidence of the several matters therein contained; and by the Land Transfer Rules (1903), 260, where an office copy of an entry in the register, or of the filed plan of the land, or of any document filed in the registry is annexed to any certificate it shall, for the purposes of sect. 80 of the Act of 1875, be deemed to be contained in the certificate itself. Copies of the instrument of transfer are not annexed to the land certificate issued on the completion of the transfer, but certificates of charge now contain an office copy of the instrument of charge. See Land Transfer Rules (1903), 258, 259.
(*a*) A conveyance of the transferor's estate, where made *ex abundanti cautelâ*, and not strictly necessary, may be considered as ancillary to this end; above, pp. 1129, 1141.
(*b*) Above, pp. 1115, 1143, 1144. (*c*) Above, p. 1144.
(*d*) First Schedule, Form 20.

in the instrument of transfer.

the consideration money is paid, nor does it contain any receipt for the payment made. Care should be taken in adapting this form to practical use to amend it in these particulars, especially as regards the receipt for payment of the purchase money, in default of which the purchaser would not be justified in paying the money to the vendor's solicitor producing the instrument duly executed, except by virtue of an express authority in that behalf properly conferred (*e*).

Stamps on sale of registered land.

The Land Transfer Act, 1875 (*f*), provides that, previously to registering any disposition of land, it shall be the duty of the registrar to ascertain that all such stamp duties have been satisfied as would be payable if the disposition to be registered had been an unregistered disposition. And by the Land Transfer Rules (1903), No. 123, when an application or instrument capable of registration is made or executed for the sole purpose of carrying out on the register a transaction already effected by a deed or other instrument not on the register, the Inland Revenue stamp on the transaction shall be affixed to or impressed on the last mentioned deed or instrument, and the registered instrument shall bear no stamp duty; provided that the stamped instrument shall before the completion of the registration be produced to an officer of the registry, to show that all duty payable in respect of the transaction has been paid. If therefore a sale of registered land is to be completed by an instrument of transfer alone (*g*) duly registered, such instrument must be stamped according to the law regulating the stamping of conveyances on sale of unregistered land (*h*). But in those cases where the instrument of transfer is accompanied by an unregistered assurance to the purchaser of the land sold (*i*), that assurance must be duly stamped as a conveyance on sale, and the instrument of transfer will then require no stamp. Besides the proper Inland Revenue stamps, instruments or applications delivered for registration at the Land Registry must bear the proper Land Registry fee stamps (*k*).

Land Registry fee stamps.

(*e*) See above, pp. 694-698.
(*f*) Stat. 38 & 39 Vict. c. 87, s. 83 (7).
(*g*) Above, p. 1141.
(*h*) Above, pp. 652-667.
(*i*) Above, pp. 1141-1144.
(*k*) See Land Transfer Rules (1903), 111; Land Transfer Fee Order, 1903, r. 3.

Purchaser of registered land entitled to delivery of the title deeds.

It is thought that, on the sale of registered land, the purchaser is equally entitled, as in the case of unregistered land (*l*), to have all documents of title, which relate solely to the purchased land, delivered over to him on completion. And this appears to be the case, notwithstanding that the vendor be registered with an absolute title, so that the purchaser could not call for any abstract or for production of these documents (*m*). So also documents of this kind dealing with registered incumbrances prior to first registration, which are discharged on completion of the sale, should be handed over to the purchaser, whether the proprietorship of such incumbrances were registered or not (*n*). But the purchaser's right to require any statutory acknowledgment or undertaking with respect to any document of title, which may lawfully be withheld from him, appears to be limited to such documents as are necessary to make a good title according to the contract, this being the rule applicable on the sale of unregistered land (*o*).

Registration with qualified or possessory title does not make a good root of title.

Here it may be observed that, owing to the limited effect given to the first registration of land with a qualified or possessory title (*p*), such registration can never form a good root of title (*q*); so that, as a rule, a purchaser under an open contract of land so registered will always be entitled to call for the title prior to registration.

Sale of registered leaseholds.

But where registered leasehold land (*r*) is sold as such under an open contract, it appears that the purchaser has no more right to call for the lessor's title than if the land were not registered (*s*); so that, if the land be registered with a good leasehold title (*t*), the purchaser will be precluded from inquiring into any other title than that registered (*u*). It appears however that any registered leasehold land, which is held by underlease, must be so described

Where held by underlease.

(*l*) Above, p. 639.
(*m*) Above, p. 1113. It may be mentioned here that, on the completion of any application for registration of title, all documents of title that have been used in support of the application are returned to the applicant; Land Transfer Rules (1908), I. 47.
(*n*) Above, pp. 1120-1122.
(*o*) Above, p. 642.
(*p*) Above, p. 1115, nn. (*q*), (*r*).
(*q*) Above, p. 98; see 2nd Rep. (1911) of Land Transfer Commissioners, §§ 56, 61.
(*r*) See above, p. 369, and n. (*n*).
(*s*) Above, pp. 92-94, 1113-1115.
(*t*) Above, p. 1115, n. (*q*).
(*u*) Above, p. 1113.

in the contract, or the purchaser will be entitled to object to the title (*x*). And it should be particularly noted that a registered transfer of leasehold land vests in the transferee the possession of the land comprised in the registered lease for all the leasehold estate therein described, but *subject* (amongst other things (*y*)) to all implied and express covenants, obligations and liabilities incident to such leasehold estate (*z*). And such covenants, obligations and liabilities do not appear on the register, except only that the existence of a prohibition against alienation without licence should be found noted thereon. A purchaser of registered leasehold land must therefore call for an abstract and production of the lease under which the land sold is held, in order to ascertain to what covenants, obligations and liabilities he will become subject. And it is submitted that he is necessarily entitled to demand such abstract and production under an open contract, notwithstanding the terms of sect. 16 of the Land Transfer Act, 1897, above quoted (*a*); for he does not require the same as evidence of the vendor's title, but as evidence of matters adverse thereto and excluded from the effect of registration; and he would certainly be entitled to such evidence of these matters if the land were not registered. At the same time, a purchaser of registered leasehold land by private contract is advised to place his rights in this respect beyond doubt by special stipulation. If the covenants or conditions in the lease should be unusually onerous or stringent, it is thought that the purchaser would be entitled, under an open contract, to object to the title, as upon a sale of unregistered land (*b*). And generally, in all other respects, save as to proof of title and assurance by registered transfer, contracts for sale of registered leasehold land are governed by the same rules as are applicable in the case of unregistered leaseholds (*c*). By the Land Transfer Rules, 1903, No. 62,

Purchaser must require an abstract and production of the lease.

Unusually onerous covenants.

(*x*) Above, pp. 93, n. (*i*), 339.

(*y*) These are (1) registered incumbrances; (2) unless the contrary is expressed on the register, such liabilities, rights and interests as affect the leasehold estate and are by the Acts declared not to be incumbrances in the case of registered freehold land; and (3) estates, rights or interests exempted from the effect of registration with a qualified, good leasehold or possessory title; see above, pp. 1113, n. (*o*), 1115, and nn. (*q*), (*r*), 1116-1119, 1126, 1136, 1137, and next note.

(*z*) Stat. 38 & 39 Vict. c. 87, ss. 13, 35, 38; Land Transfer Rules (1903), 55-59, 140-142.

(*a*) Above, p. 1113.

(*b*) Above, pp. 339, 340.

(*c*) Above, pp. 339 *sq.*

on the registration of any leasehold land held under a lease containing a prohibition against alienation without licence, all estates, rights, interests, powers and remedies under such lease, arising upon or by reason of any alienation without licence, shall be expressly exempted from the effect of registration. On the sale of any such leasehold land therefore, the lessor's licence to the transfer to the purchaser must be obtained as in the case of unregistered land (*d*).

Registered leaseholds subject to a restriction on alienation without the lessor's licence.

By the Land Transfer Act, 1875 (*e*), on any transfer of leasehold land thereunder, there shall be implied, in the absence of any entry in the register negativing such implication, a covenant by the transferor that, notwithstanding anything by him done, omitted or knowingly suffered, the rent has been paid and the lessee's covenants and conditions in the lease observed and performed up to the date of the transfer, and a covenant by the transferee to pay the rent and perform and observe such covenants and conditions in future, and to indemnify the transferor against non-payment of the rent or breach of such covenants or conditions (*f*).

Covenants implied on transfer of registered leaseholds.

Land, which is the subject of a settlement, may be registered under the proprietorship either of the tenant for life having the power of sale given by the Settled Land Acts (*g*), or of the trustees of the settlement having the power of sale or holding the land on trust for sale, or where there is an overriding power of appointment of the fee simple, of the persons in whom that power is vested (*h*): but in each case there must also be entered on the register such restrictions or inhibitions as may be prescribed by the rules or may be expedient for the protection of the rights of the persons beneficially interested in the land (*i*). Thus where the tenant for life is registered as proprietor, restrictions are entered prohibiting transfers except under an order of the registrar or by way of sale whereon the purchase

Purchase of registered land which is settled.

(*d*) Above, pp. 348 *sq.*
(*e*) Stat. 38 & 39 Vict. c. 87, s. 39; see Land Transfer Rules (1903), 138, 139, of which the latter modifies and extends this enactment in a manner appropriate to the transfer of part of the land comprised in the lease.
(*f*) Above, pp. 612, 615.
(*g*) Above, pp. 281 *sq.*
(*h*) Stats. 38 & 39 Vict. c. 87, s. 68; 60 & 61 Vict. c. 65, s. 6 (1).
(*i*) Stat. 60 & 61 Vict. c. 65, s. 6 (2); see Land Transfer Rules (1903), 78-81, 128, 129, 186-190.

money is to be paid to the trustees of the settlement (*k*); and where the trustees are registered as the proprietors, restrictions are entered on transfers, unless made under such an order or with the consent of the tenant for life (*l*). And proper restrictions on registered charges are also entered. But in all these cases the person or persons, in whose proprietorship the land is registered, can, subject only to the restrictions entered on the register, exercise all the powers of disposition given by the Land Transfer Acts to the registered proprietor of registered land (*m*). If, therefore, any such person or persons be registered with an absolute title, a purchaser of the land so registered is only concerned (apart from the matter of registered incumbrances and things declared not to be incumbrances (*n*)) to see that the vendor's proprietorship is registered as claimed (*o*), and that the restrictions entered on the register shall be duly observed (*p*). He is not concerned to see whether the vendor has any power of sale under the settlement or by virtue of the Settled Land Acts; nor, indeed, is he entitled to call for production of the instrument of settlement, or for any information or evidence as to its contents (*q*). But where the tenant for life or the trustees has or have been registered with a possessory title only subsequently to the date of the settlement, it will be incumbent on a purchaser from him or them to ascertain by investigation of the title in the same manner as if the land were not registered, that the vendor or vendors had at the time of first registration such a power of sale as would have entitled him or them to be registered as proprietor or proprietors of the land with an *absolute* title (*r*). If he be satisfied as to this, he may accept the title and take the statutory transfer without any other assurance (*s*). Otherwise he must of course require such further assurance as may be necessary in the circumstances (*t*). Where land has been first registered with a posses-

(*k*) Land Transfer Rules (1903), First Schedule, Forms 6, 7.
(*l*) Ibid. Form 8. See above, pp. 272 *sq.*
(*m*) See stat. 38 & 39 Vict. c. 87, ss. 22 *sq.*, 29 *sq.*; 60 & 61 Vict. c. 65, ss. 6 (8), 8.
(*n*) Above, pp. 1113, 1120 *sq.*
(*o*) Above, p. 1118.
(*p*) Above, p. 1123.
(*q*) Stat. 60 & 61 Vict. c. 65, s. 6 (6); and sect. 16 (1), above, pp. 1113, 1116.
(*r*) Above, p. 1144.
(*s*) Above, p. 1144.
(*t*) Above, pp. 1116-1118, 1136, 1143, 1144.

sory title, and a settlement thereof has been subsequently made, and the tenant for life or trustees registered, pursuant to a transfer to the uses of the settlement (*u*), as proprietor or proprietors, a purchaser from him or them under an open contract will of course have to investigate and, if necessary, get in the title prior to first registration (*v*), but as regards the estate comprised in the settlement he will only have to see that he obtains the statutory transfer free from registered incumbrances and things declared not to be incumbrances (*x*); and he will not be entitled to call for production of the settlement (*y*), and is not concerned to see whether the vendor or vendors has or have any power of sale thereunder. The same principles are of course applicable where settled land is purchased from persons registered as the proprietors thereof in virtue of their having an overriding power of appointment (*z*).

Purchase of registered land subject to registered charges or incumbrances.

Where registered land is sold subject to registered charges created *subsequently* to first registration (*a*), which it is not proposed to pay off, it appears that, if the vendor be registered with an absolute title, or if the title prior to first registration with a possessory title were perfect (*b*), the purchaser will, on registration of the transfer to himself, obtain the *legal* estate in the land sold, subject to the registered charges, but free from all other estates or interests, save only those declared not to be incumbrances (*c*). And this is equally the case, although the chargees hold unregistered mortgages of the vendor's estate (*d*). The purchaser will therefore be in a more favourable position in some respects than the purchaser of an equity of redemption of unregistered land (*e*). Thus he will not take subject to *all* equitable interests created previously to the sale (*e*). Nor is he liable, as it appears, to be adversely affected by tacking (*f*); for the estate conferred upon him by the registration of the transfer to himself will only be subject to *registered* charges; and it is thought that any unregistered further charges in

Tacking.

(*u*) See Land Transfer Rules (1903), 128.
(*v*) Above, pp. 1116-1119, 1136, 1143, 1144.
(*x*) Above, pp. 1113-1115, 1119.
(*y*) Above, pp. 1113 *sq.*
(*z*) Above, p. 1149.
(*a*) Above, p. 1122.
(*b*) Above, pp. 1143, 1144.
(*c*) Above, p. 1126.
(*d*) Above, p. 1126.
(*e*) Above, p. 453.
(*f*) Above, p. 453.

favour of any registered chargee will be extinguished by the effect of the registered transfer, notwithstanding that he had notice of them (*g*).

Consolidation of securities.

As regards the risk of consolidation (*h*), it is provided by the Land Transfer Act, 1897 (*i*), that nothing contained in any charge shall affect any registered dealing with land or a charge in respect of which the charge is not expressly registered or protected in accordance with the Act of 1875 and that Act. This is not a very lucid enactment. But it appears that, where a registered charge reserves the right of consolidation, such right cannot be exercised to the prejudice of a subsequent registered transferee or chargee of the land, unless the right were noted in the register (*k*). Where the right of consolidation has been reserved in a mortgage of other land than that comprised in a registered charge (whether the other land be registered or not), and affected or has come to affect (*l*) the land comprised in the registered charge, the case does not come within the terms of the enactment quoted. But here the creditor's right of consolidation appears to be an equity arising independently of the registered charge; and it seems that, unless the right were noted in the register against the land comprised in the registered charge (*m*), it would be extinguished by the effect of a registered transfer for value from the registered proprietor of that land (*n*). The result appears to be that a purchaser of registered land, subject to registered charges created subsequently to first registration, need only regard the charges registered and any right of consolidation entered on the register. But the purchase of registered land to be transferred subject to registered incumbrances *prior* to first registration is very different. In such case the incumbrances will remain paramount to the estates conferred by the registered transfer; and it does not appear that the registration of the transfer would extinguish any legal estate outstanding in any one of the incumbrancers (*o*). The purchaser therefore would get no more than an equity of redemption,

(*g*) Above, pp. 1126, 1132.
(*h*) Above, p. 453.
(*i*) Stat. 60 & 61 Vict. c. 65, s. 9 (4).
(*k*) See Land Transfer Rules (1903), 169.
(*l*) See above, p. 453, and n. (*i*).
(*m*) See last note but one.
(*n*) See above, p. 1126.
(*o*) Above, p. 1126.

and he would be exposed to some, though not to all, of the risks to which he would be liable if the land were not registered (*p*). Thus where the proprietorship of such incumbrances has not been registered, it seems that the owners of them would not be deprived of any rights of consolidation or tacking which they might exercise if the land were not registered. And it is questionable whether the owners of such incumbrances are in any worse position in these respects, where they have procured themselves to be registered as proprietors of the incumbrances; although it may be contended that they have thereby rendered themselves liable to the same law as governs the proprietors of registered charges subsequent to first registration (*q*).

Registered incorporeal hereditaments.

The title to any advowson, rent, tithes impropriate or other incorporeal hereditaments of freehold tenure, may be registered under the Land Transfer Acts (*r*). And, as it is expressly enacted that all hereditaments, corporeal or incorporeal, shall be deemed land within the meaning of these Acts (*s*), it appears that the registered proprietor of any incorporeal hereditament so registered has the same statutory powers of disposition as the registered proprietor of registered land (*t*). But nothing in the Land Transfer Act, 1897, shall render compulsory the registration of the title to an incorporeal hereditament (*u*). As we have seen (*x*), quit rents, crown rents, and other rents having their origin in tenure, tithe rentcharge, and payments in lieu thereof or of tithes, profits *à prendre*, and easements, are amongst the matters declared by the Acts not to be incumbrances, and are thus exempted from the effect of first registration and of the registered transfer of registered land (*y*). These incorporeal hereditaments, therefore, if not registered (*z*), remain subject

(*p*) Above, p. 453.
(*q*) See above, p. 1122, and n. (*m*).
(*r*) Stats. 38 & 39 Vict. c. 87, s. 82; 60 & 61 Vict. c. 65, First Schedule; Land Transfer Rules (1903), 71-73.
(*s*) Stat. 60 & 61 Vict. c. 65, s. 24 (1).
(*t*) Above, pp. 1112, n. (*c*), 1126.
(*u*) Stat. 60 & 61 Vict. c. 65, s. 24 (1); see sect. 20 (1, 2); above, p. 369.
(*x*) Above, p. 1113, n. (*o*).
(*y*) Above, pp. 1114, n. (*p*), 1115, nn. (*q*), (*r*).
(*z*) As above mentioned (p. 1114, n. (*o*)), *notice* of such liabilities, rights or interests as are declared not to be incumbrances may be entered on the register; but it is not provided that such notice shall have any particular effect, and it appears to have no effect beyond giving notice of what is entered.

to the general law (*a*) as regards their sale and assurance, notwithstanding that they arise within a district where registration is compulsory (*b*). But the sale and assurance of any registered incorporeal hereditaments is governed by the same rules as apply in the case of registered land (*c*).

Rentcharges issuing out of registered land.

Rentcharges or annuities issuing out of registered land are not amongst the things declared not to be incumbrances (*d*). They appear to be incumbrances on the land (*e*), and if already existing when the land is registered, they may be entered in the register as incumbrances prior to first registration, either without their proprietorship being registered or not (*f*). When so entered, they will be protected, as being registered incumbrances, from the effect of first registration and registered transfers of the land (*g*). If the proprietorship of such rentcharges be not registered, they will remain subject to the general law as regards their sale and assurance (*h*). But if their owners procure themselves to be registered as the proprietors thereof, it appears that the rentcharges will thenceforth be assimilated to, and transferable in the same manner as, rentcharges created by registered charge subsequently to registration of the land charged (*i*). Under the Land Transfer Act, 1897 (*k*), rentcharges or annuities to issue out of registered land may be created by way of registered charge (*l*). And the registered proprietors of such charges have the same powers of disposition by way of registered transfer and sub-charge thereof as are given in case of registered charges to secure payment of a

(*a*) Above, p. 415 *sq.*
(*b*) See above, p. 367.
(*c*) Above, pp. 1113 *sq.*
(*d*) Above, p. 1113, n. (*o*).
(*e*) See above, p. 165, n. (*s*).
(*f*) Land Transfer Rules (1908), I. 43; (1903), 175-181; above, pp. 1114, 1120, 1126.
(*g*) Above, p. 1120.
(*h*) Above, pp. 415 *sq.*
(*i*) See above, p. 1122, and n. (*m*).
(*k*) Stat. 60 & 61 Vict. c. 65, s. 9 (3); Land Transfer Rules (1903), 160.
(*l*) In such case the grantee of the rentcharge appears to have the rights and remedies given by the Land Transfer Acts to the registered proprietor of a registered charge, so far as the same are applicable to the recovery of an annuity (see stats. 38 & 39 Vict. c. 87, ss. 23-27; 60 & 61 Vict. c. 65, s. 9 (3)); and in addition, the remedies conferred by sect. 44 of the Conveyancing Act, 1881 (stat. 44 & 45 Vict. c 41).

principal sum of money (*m*). Besides this, the Act of 1875 (*n*) provided for the registration of any fee farm grant, or other grant reserving rents or services, to which the fee simple estate in any freehold land about to be registered or registered might be subject, with such particulars of the land or services, and the conditions annexed to the non-payment or non-performance or otherwise of such rent and services, as might be prescribed; and enacted that any record so made should be conclusive evidence as to the rents, services and conditions so recorded, and such fee simple estate as last aforesaid should be subject thereto accordingly. Where a transfer of registered land in consideration of a rentcharge is registered under this enactment, the transferee is to be registered as the proprietor of the land, the rentcharge entered in the charges register as an incumbrance thereon (*o*), and the transferor registered as the proprietor of the rentcharge under a separate title (*p*). It is obvious that rentcharges or annuities, to issue out of land already registered, should be created either by registered charge or by way of registered transfer subject to a rentcharge, so that the title thereto can be duly registered; as, if granted by unregistered disposition, they will be liable to be extinguished by the effect of a registered transfer for value of the land on which they are charged (*q*).

Rights appendant and appurtenant.

Under the Land Transfer Act, 1875, first registration as proprietor of freehold land, or a registered transfer of such land, vests in the proprietor or transferee all rights, privileges and appurtenances belonging or appertaining thereto (*r*); and first registration as proprietor of leasehold land, or a registered transfer of such land, vests in the proprietor or transferee all implied or expressed rights, privileges and appurtenances attached to the leasehold estate described in the registered lease (*s*). It does not appear that these provisions vest in the

(*m*) Stats. 38 & 39 Vict. c. 87, s. 40; 60 & 61 Vict. c. 65, s. 22 (6, c); Land Transfer Rules (1903), 178-181.
(*n*) Stat. 38 & 39 Vict. c. 87, s. 82.
(*o*) Land Transfer Rules (1903), 130.
(*p*) Ibid. r. 131.
(*q*) Above, p. 1126.
(*r*) Stat. 38 & 39 Vict. c. 87, ss. 7-9, 30-33.
(*s*) Sects. 13, 35, 38; Land Transfer Rules (1903), 55-57, 59, 140-142.

proprietor or transferee any rights which are not *legally* appendant or appurtenant to the land (*t*). But the Land Transfer Rules (1903) provide that the registration of a person as proprietor of land shall vest in him, together with the land, all rights, privileges and appurtenances appertaining or reputed to appertain to the land or any part thereof or at the time of registration demised, occupied or enjoyed therewith or reputed or known as part or parcel of or appurtenant to the land or any part thereof (*u*). It seems questionable, however, whether this rule is authorised by the rule-making powers conferred by the Land Transfer Acts (*x*); as the rule purports to vest in the registered proprietor more extensive legal rights than are conferred on him by the operative words of the Act. It is also a question whether a registered transfer of registered land is a conveyance within the meaning of sect. 6 of the Conveyancing Act, 1881 (*y*), so as to operate by virtue of that Act to convey to the transferee all privileges or advantages enjoyed with the land at the time of conveyance; for this enactment applies only to conveyances by deed (*z*), and although all instruments of transfer are required to be executed as deeds (*a*), they derive their conveyancing effect from the Land Transfer Act, 1875 (*b*), and not from the form prescribed for the instrument of transfer. For this reason, amongst others, it is desirable to insert in every instrument of transfer proper words of conveyance of the transferor's estate (*c*); as in that case sect. 6 of the Conveyancing Act, 1881, will certainly apply (*d*). When the vendor of registered land is entitled to modify (*e*) the effect of these statutory provisions, he must be careful to insert the words necessary for his protection in the instrument of transfer.

Creation of leases and of easements or

The statutory *powers* (*f*) of disposition given by the Land Transfer Acts to the registered proprietor of registered land

(*t*) See above, p. 600.
(*u*) Rule 254.
(*x*) See stats. 38 & 39 Vict. c. 87, s. 111; 60 & 61 Vict. c. 65, s. 22 (6).
(*y*) Stat. 44 & 45 Vict. c. 41; see above, p. 600.
(*z*) Sect. 2 (v).
(*a*) Above, p. 1141.
(*b*) Above, notes (*r*), (*s*), p. 1155.
(*c*) See above, pp. 1129, and n. (*i*), 1141-1145, and n. (*z*).
(*d*) See above, p. 600.
(*e*) See above, pp. 600 *sq.*
(*f*) Above, p. 1126.

other rights over registered land.

do not extend beyond the transfer of the land registered, or any part thereof, and the creation of registered charges thereon (*g*); they are not exercisable for making a lease of the land for any term of years (*h*), or for the grant of any *profit à prendre*, easement, or similar right over the land registered. If, therefore, a sale be made of any such right to be created anew over registered land, effect can only be given to the contract (except in the case mentioned above (*i*)) by the same method of assurance as if the land were not registered. In such case the purchaser will have the same right of investigating the vendor's title to the land, over which the right sold is to be granted, as if the land were not registered (*k*); subject, however, to the rule already mentioned (*l*), that where an absolute title is vested in the vendor by Act of Parliament, as on registration under the Land Transfer Acts with absolute title (*m*), he cannot be required to give any other or earlier proof of his title. And the purchaser will be entitled to call for an abstract and production of all unregistered assurances dealing with the land in question off the register; since the vendor cannot, by any conveyance of the right sold, extinguish any estate or interest so created (*n*). The purchaser will also have the same right to covenants for title (*o*), and he should make the same searches (*p*) as if the land were not registered (*q*). Where such a right is sold by itself, it must necessarily be granted by an unregistered deed; but the purchaser may as well procure notice of the right to be entered on the register (*r*). Where a contract for the sale of some registered land includes an agreement for the sale of

Searches.

(*g*) Stats. 38 & 39 Vict. c. 87, ss. 22, 29; above, p. 1154, n. (*k*).

(*h*) It should be noted that, since leases for years of registered land can only be created to take effect out of the *estate* of the registered proprietor and not by virtue of his statutory *power* of disposition, it is necessary, on every occasion on which his title to grant such a lease is by special stipulation to be investigated, that all his unregistered dispositions (if any) of the land shall be abstracted and produced; see above, pp. 93, 94; cf. pp. 1125, 1132 *sq.*

(*i*) Above, p. 1156, and n. (*u*).

(*k*) Above, p. 416.

(*l*) Above, p. 93, and n. (*d*).

(*m*) Above, p. 1114, n. (*p*).

(*n*) Cf. above, pp. 1125, 1126, 1157, n. (*k*).

(*o*) Above, pp. 612 *sq.*

(*p*) Above, pp. 547 *sq.*

(*q*) It does not appear that a purchaser of such a right to be created anew over registered land is a purchaser of registered land within the meaning of sect. 16 of the Land Transfer Act, 1897 (above, pp. 1113, 1153).

(*r*) See above, p. 1153, n. (*z*).

some particular easement, or other such right as aforesaid, to be granted over other registered land of the vendor's, it is thought, according to the principle asserted above (*r*), that the grant of the easement or right should be made by a deed separate from the instrument of transfer; but notice of the right may be registered against the land affected thereby (*s*).

Reservation of an easement or other right over registered land.

The Land Transfer Acts make no special provision for the reservation of any easement or similar right on the transfer of registered land. Such a reservation must therefore be effected by the like assurance as in the case of unregistered land (*t*); that is to say, by way of grant from the transferee, who must execute the deed containing it (*u*). It appears that a reservation of this kind may well be made in an instrument of transfer of registered land if apt words be employed and the transferee execute the instrument of transfer (*x*). But as the reservation of an easement or other such incorporeal hereditament as above mentioned (*y*) is not a provision necessarily giving rise to an entry in the register (*z*), and as it is desirable that the person making the reservation shall have evidence of his title thereto in his own possession (*a*), it is thought that, where a stipulation is made on the sale of registered land for any reservation in the vendor's favour (*b*), the reservation should be made by unregistered assurance to be executed in duplicate (so that the vendor may retain the counterpart), and should also be made in the instrument of transfer, which the purchaser should execute (*c*).

(*r*) Above, p. 1145.
(*s*) See above, p. 1153, n. (*z*).
(*t*) See 1 Davidson, Prec. Conv. 96, 97, 4th ed.; 75, 76, 5th ed.
(*u*) *Doe* d. *Douglas* v. *Lock*, 2 A. & E. 705, 743; *Wickham* v. *Hawker*, 7 M. & W. 63, 76; *Durham, &c. Ry. Co.* v. *Walker*, 2 Q. B. 940, 967; *Pannell* v. *Mill*, 3 C. B. 625, 637, 638; *Proud* v. *Bates*, 34 L. J. Ch. 406, 411; *May* v. *Belleville*, 1905, 2 Ch. 605.
(*x*) Above, pp. 1129, n. (*i*), 1141. It may be observed here that in order to reserve (*i.e.*, by way of grant as above mentioned) an easement or other incorporeal hereditament in fee, it seems to be necessary, and it is certainly proper, to use the appropriate words of inheritance; see Litt. s. 1; Co. Litt. 9 a, b, 307 a; 2 Black. Comm. 35; *Hewlins* v. *Shippam*, 5 B. & C. 221, 228, 229. It does not appear to be sufficient to reserve such a right to the transferor and the registered proprietor for the time being of the land, to which the right is to be annexed. See, however, 24 L. Q. R. 199 *sq.*, 259 *sq.*, 264 *sq.*
(*y*) Above, p. 1157.
(*z*) Above, p. 1145.
(*a*) See above, p. 1145.
(*b*) Above, pp. 603-605.
(*c*) Above, n. (*x*).

The vendor may then procure notice of the right created by the reservation to be registered against the land (*d*).

Restrictive conditions affecting registered land.

We have seen (*e*) that conditions restricting the use of any registered land must be registered in order to be completely effective; as, unless so registered, they are liable to be extinguished by the effect of a registered transfer of the land (*f*). But the powers of disposition given by the Land Transfer Acts do not extend to making such conditions (*g*), which must therefore be created in the same manner as if the land were not registered (*h*). And it has been held that the mere registration under these Acts of restrictive conditions (*i*) does not of itself annex them to the land, against which they are registered, as a burthen thereon, unless by some covenant or agreement made independently of the registration the land has been duly made subject to the liability so sought to be imposed (*k*). Where any registered land is sold together with the benefit of a stipulation for restricting in future the use of some adjoining land, it is thought that the purchaser has the same right of investigating the title to the adjoining land, and should make the same searches, as in the case of an easement to be created thereover (*l*); and the restrictive conditions must necessarily be created by deed of covenant separate from the instrument of transfer. Where registered land is sold subject to restrictive conditions to be newly created thereover, they should be made by separate deed of covenant to be executed by the purchaser, and should be mentioned in the instrument of transfer as well (*m*); and the transferee must execute the instrument of transfer (*n*). In either case the restrictive conditions must be duly registered (*o*), for which purpose production of the land certificate is required (*p*).

Restrictions affecting adjoining land.

Searches.

Creation of new restrictions.

(*d*) Above, p. 1153, n. (*z*).
(*e*) Above, p. 1136.
(*f*) Above, p. 1126.
(*g*) Above, p. 1157.
(*h*) Above, pp. 470, 471.
(*i*) Above, p. 1136.
(*k*) *Willé* v. *St. John*, 1910, 1 Ch. 84, 325.
(*l*) Above, p. 1158.
(*m*) Land Transfer Rules (1903), 153.
(*n*) Above, p. 1141.
(*o*) Land Transfer Rules (1903), 153, 223.
(*p*) Above, p. 1116, n. (*u*).

Removal from the register of restrictive conditions.

By the Land Transfer Act, 1875 (*q*), any restrictive condition registered thereunder as annexed to registered land may be modified or discharged by order of the Court, on proof, to the satisfaction of the Court, that such modification will be beneficial to the persons *principally interested* in the enforcement of such condition (*r*). But it appears that such conditions may also be released, wholly or partially, by *all* the persons entitled to the benefit thereof (*s*); and that the entries in the register may be removed or modified accordingly (*t*).

Joint registered proprietors.

When any land is registered in the name of two or more persons as joint proprietors thereof, it appears that they have together the same powers of disposition as a single registered proprietor (*u*), subject to any restriction thereon, which may be entered in the register (*x*). They must therefore all execute any instrument of transfer or charge which they may make.

Corporation registered as proprietor.

Transfer to a corporation.

Where an application for registration as proprietor of land or a charge is made by a corporation, evidence is required of its incorporation and of its power to deal with the land or charge (*y*); and if the corporation be in any way restrained from alienation (*z*), a restriction, protecting such restraint, is to be entered in the register (*a*). And a transfer of land to a corporation (*b*) is not to be registered until the registrar is satisfied that it is in accordance with the law of mortmain (*c*); and where it shall appear to the registrar that a right of pre-emption, or reverter, or restrictive condition, or a restriction on alienation by the transferee, or any other like right or restriction exists, or may arise, he shall enter notice of any such right or conditions, or a restriction or inhibition protecting any such

(*q*) Stat. 38 & 39 Vict. c. 87, s. 84.
(*r*) See *Ground Rent Development Co.* v. *West*, 1902, 1 Ch. 674.
(*s*) See above, pp. 474, 990.
(*t*) Land Transfer Rules (1903), 17.
(*u*) Stats. 38 & 39 Vict. c. 87, s. 69; 60 & 61 Vict. c. 65, s. 14 (1) and First Schedule.
(*x*) A restriction may be entered on dispositions by joint proprietors, after their number has been reduced below some specified limit; stats. 38 & 39 Vict. c. 87, s. 83 (3); 60 & 61 Vict. c. 65, First Schedule; Land Transfer Rules (1903), 224, 225.
(*y*) Land Transfer Rules (1903), 256.
(*z*) Above, pp. 917 *sq.*
(*a*) Land Transfer Rules (1908), I. 41.
(*b*) See L. T. R. (1903), 144.
(*c*) Above, p. 914.

right, condition, or restriction on alienation or otherwise, in such manner and form as he shall think fit (*d*). An intending purchaser or chargee of land registered in the name of a corporation should therefore find any restrictions which may exist on the corporation's powers of alienation (*e*) properly noted in the register; and, of course, he cannot take the transfer or charge unless the restrictions can be complied with or removed (*f*). But as it is enacted in the Land Transfer Act, 1897 (*g*), that where a registered disposition would if unregistered be absolutely void, the register shall be rectified, and the person suffering loss by the rectification shall be entitled to the indemnity provided by the Act (*h*), it appears that any one proposing to take a registered transfer or charge from a corporation must satisfy himself with respect to the incorporation and the powers of alienation possessed by the corporation in the same manner as if the land were not registered (*i*). For if he should omit to do this, and the transfer or charge were void as being *ultra vires* (*k*), and the necessary restriction had not been entered in the register, he might be ejected from the land or lose his charge thereon; although it appears that he would be entitled to the indemnity. And he must of course satisfy himself that the instrument of transfer or charge is executed in such manner as will bind the corporation (*l*).

Charity lands registered.

Lands, which are vested in trustees for any charitable uses, or in the official trustee of charity lands, and for the sale of which the consent of the Charity Commissioners (*m*) or Board of Education (*n*) is by statute required, may be registered in the proprietorship of such trustees or official trustee, subject to a restriction on alienation without the consent of the Commissioners or the Board, as the case may be (*o*). But land, which is held for charitable uses and can be sold without the consent

(*d*) L. T. R. (1903), 146.
(*e*) Above, pp. 917 *sq.*
(*f*) Above, p. 1123.
(*g*) Stat. 60 & 61 Vict. c. 65, s. 7 (2).
(*h*) See sect. 7 (1); stat. 38 & 39 Vict. c. 87, s. 95.
(*i*) Above, p. 927.
(*k*) Above, pp. 917-920.
(*l*) Above, p. 929.
(*m*) Above, pp. 437 *sq.*
(*n*) Above, p. 443.
(*o*) Land Transfer Rules (1903), 83, 84, 86; see *Re Child Villiers' Application*, 1922, 1 Ch. 394.

of the Charity Commissioners or the Board (*p*), may be registered in the proprietorship of the trustees thereof having the power of sale (*q*) without any restriction (*r*). Where application for registration as proprietors of land or a charge is made by any body of trustees, in whom, as such, property from time to time vests (*s*), evidence is required of the provisions under which the property so vests and of their power to deal with the land or charge (*t*); and if their estate be subject to a restraint on alienation, a restriction protecting the same is to be entered (*u*). A transfer of land for charitable uses (*x*) shall not be registered until the registrar is satisfied that it is in accordance with the law relating to charitable uses (*y*); and the like notice, restriction or inhibition is to be entered, where necessary, as on a transfer to a corporation (*z*). Owing to the above mentioned provision of the Land Transfer Act, 1897, as to registered dispositions, which if unregistered would be absolutely void (*a*), it appears that, where an intending purchaser or chargee of land registered in the name of joint proprietors or a sole proprietor, without any restriction, has notice that it is held upon any charitable trust, he should satisfy himself that it can lawfully be disposed of without the consent of the Charity Commissioners, or Board of Education, in the same manner as if the land were not registered (*b*).

Effect of a registered disposition which if unregistered would be void.

Here it may be observed that the above mentioned enactment of the Land Transfer Act, 1897 (*c*), providing that the register shall be rectified where a registered disposition would if unregistered be absolutely void, appears to be very far-reaching in its effect, and to introduce into dealings with registered land an element of uncertainty against which a purchaser has no protection. Thus a purchaser of land from a vendor registered as proprietor with an absolute title is precluded from inquiring

(*p*) Above, pp. 438, 439, and n. (*c*).
(*q*) Above, pp. 368, n. (*i*), 1149.
(*r*) Land Transfer Rules (1903), 85.
(*s*) Above, p. 442.
(*t*) Land Transfer Rules (1903), 256.
(*u*) L. T. R. (1908), I. 41.
(*x*) See L. T. R. (1903), 145.
(*y*) Above, pp. 425 *sq.*; see p. 428, and n. (*f*).
(*z*) Land Transfer Rules (1903), 146, quoted above, pp. 1160, 1161.
(*a*) Above, p. 1161.
(*b*) Above, pp. 438, 439, and n. (*c*).
(*c*) Above, p. 1161.

into the earlier title; he must accept the present entries in the register as conclusive evidence (*d*). If, however, the vendor had been so registered under a transfer which if unregistered would have been void (as from a corporation in excess of its powers or from trustees prohibited from selling without the Charity Commissioners' consent (*e*)), it appears that those entitled by virtue of the nullity of such transfer would have the right to have the register rectified; that is to say, they might insist that the vendor was not the lawful registered proprietor of land, and procure the removal of his name from the register. But if it can be so maintained that the vendor is not the registered proprietor of the land, it appears to follow that he cannot validly exercise the powers of disposition given to the registered proprietor, so as to extinguish outstanding interests (*f*). The transfer to the purchaser therefore, though duly registered, would appear not to vest in him an indefeasible estate in fee simple (*g*), but to give him only an estate voidable at the instance of those entitled to the rectification of the register. It is true that the purchaser would be entitled to an indemnity under the Land Transfer Act, 1897 (*h*); but, as was recognised in founding the jurisdiction to decree specific performance (*i*), pecuniary damages are not an adequate compensation for being deprived of land purchased with the expectation of an indefeasible title. Other instances of registered dispositions, which if unregistered would be absolutely void, are forged transfers (*k*), and transfers void for mistake (*l*) or for non-compliance with the statute regulating the assurance of land to charitable uses (*m*). It should be noted that, in the above respects, a person taking or deriving title under a *registered transfer of a registered charge* made by a registered proprietor, whose title was acquired under a void disposition, appears to stand in a more favourable position; as it is enacted in the Land Transfer Act, 1897 (*n*), that a registered transferee for value of a charge

Protection of persons claiming under a *transfer* of a charge made by a proprietor entitled under a void disposition.

(*d*) Above, p. 1113.
(*e*) Above, pp. 1161, 1162.
(*f*) See Vaughan Williams, L. J., *A.-G.* v. *Odell*, 1903, 2 Ch. 47, 75.
(*g*) Above, p. 1142.
(*h*) Above, p. 1161, and n. (*h*).
(*i*) Above, p. 1052.
(*k*) Above, p. 818.
(*l*) Above, p. 745, n. (*p*).
(*m*) Above, pp. 425 *sq.*, 427, 1162.
(*n*) Stat. 60 & 61 Vict. c. 65, First Schedule, amending stat. 38 & 39 Vict. c. 87, s. 40.

and his successors in title shall not be affected by any irregularity or invalidity in the original charge itself, of which the transferee was not aware when it was transferred to him. But the like protection is not accorded to the original chargee himself, nor to persons claiming under a void transfer of a valid charge. Thus it has been decided that in the case of a forged transfer of a charge, the name of the person misled by the forgery must be removed from the register, and that he is not entitled to the indemnity provided by the Act (*o*).

Undivided share in land; mines apart from surface.

The title may be registered to an undivided share in land, or to mines and minerals severed from the surface, or to cellars, flats, or chambers, in the same manner as to the entirety (*p*). But we have seen (*q*) that nothing in the Land Transfer Act, 1897, shall render compulsory the registration of the title to an undivided share in land, or to mines and minerals apart from the surface. This exemption, however, is not extended to cellars, flats, chambers, or similar hereditaments (*r*).

Copyholds and customary freeholds.

Copyholds cannot be registered as such under the Land Transfer Acts; nor customary freeholds in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of the tenant (*s*). But freeholds intermixed with and indistinguishable from copyholds or customary freeholds may be so registered: though in such case notice is to be entered on the register of the facts relating to the tenure of the land, and the tenure of that portion of the land, which is not freehold, will remain unaffected by the registration (*t*). We have seen that nothing in the Land Transfer Act, 1897, is to render compulsory the registration of the title to freeholds intermixed with and indistinguishable from lands of other tenure, or to corporeal hereditaments *parcel* of a manor and

(*o*) *A.-G.* v. *Odell*, 1906, 2 Ch. 47.

(*p*) Stats. 38 & 39 Vict. c. 87, s. 82; 60 & 61 Vict. c. 65, s. 14 (1); Land Transfer Rules (1903), 71-77.

(*q*) Above, p. 369; see also pp. 373-375.

(*r*) See stat. 60 & 61 Vict. c. 65, s. 24; above, p. 369.

(*s*) Stat. 38 & 39 Vict. c. 87, s. 2. But if at any time land is found to have been registered with absolute or qualified title contrary to the provisions of this section, the registration shall not be annulled, but shall be deemed an error not capable of rectification under the principal Act, and any person suffering loss thereby shall be indemnified accordingly; stat. 60 & 61 Vict. c. 65, First Schedule.

(*t*) Stat. 38 & 39 Vict. c. 87, s. 67; Land Transfer Rules (1903), 87.

included in a sale of a manor as such (*u*). The title to a manor or a seignory may be registered (*x*).

Manor; seignory.

The purchase of registered land from a mortgagee exercising his power of sale is a matter demanding special notice. A mortgagee of registered land may occupy one of four different positions. First, his mortgage may be a registered incumbrance, prior to first registration with an absolute title, whereof the proprietorship is not registered (*y*). Secondly, the mortgagor may have registered, after the mortgage, with a possessory title, but the mortgagee may not have been registered as proprietor of the incumbrance (*z*). Thirdly, the mortgage may be a registered incumbrance, prior to first registration with an absolute or a possessory title, whereof the proprietorship *is* registered (*a*). And fourthly, the mortgage may have been made subsequently to the registration of the land (*b*).

Purchase of registered land from a mortgagee exercising his power of sale.

In the first of these cases all that has to be ascertained from the register is that the incumbrance is duly registered, as alleged, so as to remain paramount to the effect of first registration with an absolute title and of registered transfers of the land (*c*). This done, the investigation of the title will be conducted in the same manner exactly as if the land were not registered (*d*); the same points being particularly attended to as on a purchase of unregistered land from a mortgagee exercising his power of sale (*e*). But the assurance of the land sold to the purchaser and the completion of the contract present some difficulty, owing to the fact that the land is registered in the proprietorship of the mortgagor, or his successor in estate, who presumably is

1. Purchase from an incumbrancer, prior to first registration with absolute title, not registered as proprietor of the incumbrance.

(*u*) Above, p. 369, and n. (*k*).
(*x*) Stat. 38 & 39 Vict. c. 87, s. 82; Land Transfer Rules (1903), 71; above, p. 1153.
(*y*) Above, p. 1120.
(*z*) In such case the mortgage will have been an estate, right, or interest adverse to or in derogation of the mortgagor's title and so exempted from the extinguishing effect of the first registration of such title; see above, pp. 1115, n. (*r*), 1126, 1143, 1144. If such registration took place before the 1st Jan. 1909, the mortgage would not have been entered on the register as an incumbrance; but it will have been so entered if the registration took place on or after that date; above, p. 1119, and n. (*y*).
(*a*) Above, p. 1121.
(*b*) Above, pp. 1122, 1123.
(*c*) Above, pp. 1114, (*p*), 1126.
(*d*) Above, p. 1122.
(*e*) Above, pp. 313 *sq*.

no party to the contract. We will suppose that the purchaser is buying under an open contract and that the land sold is situated in a district where registration on sale is compulsory (*f*). As the vendor is selling an estate paramount to the title of the registered proprietor and entirely unaffected by the registration, it is at least questionable whether he is a vendor of registered land within the meaning of sect. 16 of the Land Transfer Act, 1897 (*g*): but it is submitted that in the case of freehold land he is, since the land sold is in fact already registered, and the vendor cannot, by conveyance under his power of sale, confer a title under which an application can be made for registration as *first* proprietor of the land (*h*). If this suggestion be correct, the vendor will be bound, at the purchaser's request and *at his own expense, and notwithstanding any stipulation to the contrary,* either to procure the registration of himself as proprietor of the land, or of the incumbrance, under which he is selling, or to procure a transfer from the registered proprietor to the purchaser (*i*). And if the sale be not regulated by the above enactment, it is thought that, under an open contract, the vendor would nevertheless be bound to procure the purchaser's registration as proprietor of the land: otherwise, although it appears that the purchaser would obtain the legal estate (*k*), there would remain outstanding the registered proprietor's interest with the powers of disposition incident thereto (*l*). But in this event the purchaser would have to bear the expense of such registration, except that of any acts to be done for this purpose by the vendor himself or any other necessary party, such as the registered proprietor of the land (*m*). The sale should, it is thought, be completed by an unregistered assurance of the estate sold to the purchaser, in which the vendor should covenant

(*f*) Above, pp. 367 *sq.*

(*g*) Above, pp. 1113-1115; see *Re Voss & Saunders' Contract,* 1911, 1 Ch. 42, deciding that a mortgagee of leaseholds by demise (prior to first registration with possessory title) selling *his sub-term* does not sell registered land.

(*h*) See stat. 60 & 61 Vict. c. 65, s. 20 (1, 2); above, pp. 367, 368.

(*i*) Above, p. 1115.

(*k*) Because the vendor could not confer a title under which an application for *first* registration could be made; see above, n. (*h*); Cozens-Hardy, L. J., *Capital and Counties Bank, Ld.* v. *Rhodes,* 1903, 1 Ch. 631, 656, 657.

(*l*) Under the general law of sale, it is the duty of the vendor of an unincumbered estate in fee simple to get in all outstanding interests, whether paramount to his own or not; see above, pp. 39, 150-154, 574, n. (*e*), 577, 1028, 1029.

(*m*) Above, pp. 370, 371, 685-687, 1132, n. (*s*).

against incumbrances (*n*), followed by the registration of the purchaser as proprietor of the land: but the purchaser should not pay the price until he has acquired a clear right to be registered as proprietor and is satisfied that his registration will relate back to the time of payment (*o*). The purchaser can only obtain this right in three ways. Either the registered proprietor of the land must at the vendor's request execute a registered transfer to the purchaser; in which case the purchaser must of course ascertain that the proprietor's title is unincumbered, or that all incumbrancers concur in the transfer (*p*). Or the vendor must procure himself to be registered as proprietor of the incumbrance, under which he is selling, when he will acquire the statutory power to transfer the land sold in exercise of his power of sale (*q*), and will be enabled to exercise the same in the purchaser's favour. Or proceedings must be taken under the Land Transfer Rules (1903), No. 151 (*r*), to procure the purchaser's registration as proprietor of the land. It is thought that the purchaser is entitled, in one way or another, to have the land sold transferred into his own registered proprietorship; and he should insist on obtaining this. If the vendor procure a transfer from the registered proprietor and all other necessary parties, or procure himself to be registered as proprietor of the incumbrance and then transfer to the pur-

(*n*) Above, pp. 1143, 1145.
(*o*) Above, pp. 1127-1132.
(*p*) Above, pp. 1119, 1122.
(*q*) Stats. 38 & 39 Vict. c. 87, s. 27; 60 & 61 Vict. c. 65, ss. 9 (1), 22 (6, c); Land Transfer Rules (1903), 175, 176; above, pp. 1121, 1122, and n. (*m*); below, p. 1170. It does not appear that in this case the vendor would have the right to procure himself to be registered as proprietor of the *land*.
(*r*) Providing that, when the power of disposing of registered land has, by the operation of any statute or statutory power or by order of Court or by paramount title, become vested in some person other than the registered proprietor (as, for instance, in the case of a deed poll executed under sect. 77 of the Lands Clauses Consolidation Act, 1845, or of a declaration vesting an estate contained in or made under or by virtue of any statute, or of a sale by a mortgagee with a title paramount to the title registered) and the registered proprietor refuses to execute a transfer, or his execution of a transfer cannot be obtained, or can only be obtained after undue delay or expense, the registrar may, after due notice under these rules to each proprietor, and on production of the land certificate, and such evidence as he may deem sufficient, make such entry in or correction of the register as under the circumstances he shall deem fit. And by r. 152, on a disposition by a mortgagee or other person under or by virtue of any estate, right, interest or power not affected by the registration, or entered as an incumbrance prior to registration, the registrar may dispense with the production of the land certificate; see above, p. 1116, n. (*u*).

chaser, the purchase money may be paid, after a priority notice has been obtained in favour of the transfer to the purchaser, on the execution of the unregistered assurance and the instrument of transfer to the purchaser and on delivery of the land certificate (*s*), or, where the vendor has been registered as proprietor of the incumbrance, of the certificate of incumbrance (*t*), with the priority notice endorsed thereon (*u*). But if application be made under rule 151 to have the purchaser's name entered as proprietor of the land, it is thought that he should not part with the purchase money until the registrar has directed the required entry to be made; for until then the purchaser has no absolute right to be so registered, and he cannot be assured that the application will be granted (*x*). The question, what searches should be made, also depends on the manner in which the purchaser's registration is to be effected. If he is to obtain a transfer from the registered proprietor of the land and all other necessary parties (the incumbrance being expunged from the register (*y*)), or from the vendor when registered as proprietor of the incumbrance under which the sale is made (*z*), it appears that the effect of the transfer, when registered, will relieve him from the necessity of making any searches other than such as are advisable on the purchase of registered land (*a*). But if application for the purchaser's registration is to be made under rule 151 (*b*), the same searches should be made as upon the sale of unregistered land (*c*); for the purchaser's claim to be so registered must be proved to the registrar's satisfaction (*b*).

Searches.

2. Purchase from a mortgagee selling under a mortgage prior to

Where the mortgage was made prior to the mortgagor's registration as first proprietor with a possessory title, the same principles apply, but the circumstances are different. The title

(*s*) And also of the certificate of charge, if any chargee concur in the transfer.
(*t*) Stat. 60 & 61 Vict. c. 65, s. 8 (4); above, p. 1118, n. (*p*).
(*u*) Above, pp. 1128 *sq.*, 1131, and n. (*q*), 1132.
(*x*) Consider the terms of r. 151, above, p. 1167, n. (*r*).
(*y*) Above, p. 1120.
(*z*) It is thought that such a transfer would have the like vesting and extinguishing effect, and would give as good a title, as a transfer by the registered proprietor of the land: but the Act does not expressly so provide; see stats. 38 & 39 Vict. c. 87, s. 27; 60 & 61 Vict. c. 65, ss. 8 (4), 9 (1, 2); above, p. 1122, n. (*m*).
(*a*) Above, pp. 1136-1139.
(*b*) Above, p. 1167, n. (*r*).
(*c*) Above, pp. 547 *sq.*

registration with a possessory title.

must be investigated and searches made in the same manner as if the land were not registered (*d*). But it is doubtful whether, in the case of freehold land, the vendor is a vendor of registered land within the above mentioned enactment; for, although the land has been already registered with a possessory title, it seems that he can confer a title under which application may be made for *first* registration with an *absolute* title (*e*). It appears, however, that for this reason, if the land sold be situate in a district where registration is compulsory, the purchaser would not obtain the legal estate unless or until he were registered as the proprietor thereof (*f*). So that he would in any case be entitled to require the vendor to procure, at his expense, his registration as proprietor of the land (*g*). It appears that this can be effected either by a transfer from the registered proprietor and his registered incumbrancers, if any, or by the vendor procuring himself to be registered as proprietor of his incumbrance and then exercising the statutory power of transfer on sale, which he will thus acquire (*h*), or by an application under rule 151 (*i*). The sale should, it is thought, be completed by an unregistered assurance of the land to the purchaser, in which the vendor should covenant against incumbrances (*k*), followed by the purchaser's registration as proprietor of the land to be obtained in one of the above mentioned ways; and the purchase money should be paid according to the mode of completion adopted (*l*).

3. Purchase from an incumbrancer, prior to first registration, registered as proprietor of the incumbrance.

Where the vendor is the registered proprietor of a registered incumbrance prior to first registration with an *absolute* title (*m*), it appears to lie in the purchaser's option whether he will investigate the title off the register or not (*n*); but it seems that he must do so, in the same manner as if the land were not registered (*o*), as he cannot ascertain from the entries in the

(*d*) Above, pp. 547 *sq.*, 1119, 1136, 1143, 1144.
(*e*) Above, pp. 1166, 1167; see above, p. 1166, n. (*g*), as to leasehold land mortgaged before registration by demise.
(*f*) Above, pp. 367, 368.
(*g*) Above, pp. 370, 371, 1166, and n. (*k*).
(*h*) Above, pp. 1167, and n. (*q*), 1168, and n. (*z*).
(*i*) Above, p. 1167, and n. (*r*).
(*k*) Above, pp. 1143-1145.
(*l*) Above, pp. 1127-1132.
(*m*) Above, p. 1121.
(*n*) Above, p. 1120.
(*o*) Above, pp. 313 *sq.*

register whether the power of sale has become exercisable or not (*p*). The vendor, being registered as the proprietor of the incumbrance under which he is selling, is enabled by the Land Transfer Acts (*q*) to give effect to his power of sale, when exercisable, by transferring the land, on which he has the registered incumbrance, in the same manner as if he were the registered proprietor thereof. What the purchaser has to ascertain, therefore, by investigation of the title and inspection of the register is that the vendor is the registered proprietor of a registered first charge prior to registration with an *absolute* title, that he has the power of sale, and that the power of sale has become exercisable (*r*). The purchaser need make no searches other than those advisable on the purchase of registered land (*s*). Completion should, it is thought, be effected by a separate assurance of the land, in which the vendor should covenant against incumbrances (*t*), together with a registered transfer from the vendor in exercise of his statutory power in that behalf; and the purchase money may be paid as above mentioned in discussing the proper mode of completing an open contract to purchase registered land (*u*). There will be no need to produce the land certificate to procure the purchaser's registration, but production of the certificate of incumbrance will be required (*x*). Where the vendor is registered as the proprietor of an incumbrance prior to first registration with a *possessory* title, completion should be effected in the same way: but it is absolutely essential to investigate the title in the same manner, and to make the same searches, as if the proprietorship of the incumbrance were not registered and the purchaser were buying from the registered proprietor of the land (*y*). For in such case it appears that a registered transfer from the vendor in exercise of his statutory power to transfer on a sale under his power of sale would not have any greater vesting or

Where the land is registered with a possessory title only.

(*p*) See Brickdale & Sheldon's Land Transfer Acts, 634, 2nd ed.

(*q*) Above, pp. 1167, n. (*q*), 1168, n. (*z*). By stat. 60 & 61 Vict. c. 65, s. 9 (1), a transfer of land made by the registered proprietor of a registered charge with power of sale shall operate as a conveyance in professed exercise of the power of sale conferred by the Conveyancing Act of 1881; see above, p. 315, and n. (*u*).

(*r*) Above, pp. 313 *sq.*

(*s*) Above, pp. 1136-1138.

(*t*) Above, pp. 1144, 1145.

(*u*) Above. pp. 1127-1132.

(*x*) Stat. 60 & 61 Vict. c. 65, s. 8 (4); above, p. 1118, n. (*p*).

(*y*) See above, pp. 1122, and n. (*m*), 1136, 1143.

extinguishing effect than a transfer from the registered proprietor of the land (*z*); that is, it would confer an estate subject to the same estates, rights or interests as would remain outstanding after a registered transfer from a proprietor registered with possessory title (*a*). Where the registered title to the land is qualified, and the purchaser buys from a mortgagee under a mortgage prior to first registration, the same principles apply as if the title to the land were possessory; but as regards estates or interests, which are paramount to the registered title to the land, the purchaser has only to ascertain that the vendor can convey the land to him free from the estate, right or interest, appearing by the register to be excepted from the effect of the first registration of that title (*b*).

Where the registered title to the land is qualified.

The sale of land under the power of sale conferred by a registered charge which has been created subsequently to the registration of the land, is similar to the last case, except that the circumstances admit of interests paramount to the charge; as where the title registered is absolute, but there are incumbrances prior to registration, or where the title registered is qualified or possessory. If there should be such interests outstanding, the title thereto must of course be proved, and they must be got in or discharged as above mentioned in case of the sale of registered land by the registered proprietor (*c*). Apart from such interests, as where the title registered is absolute and free from incumbrances prior to registration, it appears that the purchaser, under an open contract, would have no right to investigate the title off the register (*d*), or need to make other searches than those advisable on the purchase of registered land (*e*); but he would have to ascertain from the register that the vendor was the registered proprietor of a registered first charge with power of sale (*f*), and that at the

4. Purchase from a chargee subsequent to registration.

(*z*) See above, pp. 1167, and n. (*q*), 1168, n. (*z*).
(*a*) Above, pp. 1126, 1144, and n. (*r*).
(*b*) See above, pp. 1115, and n. (*q*), 1119, n. (*y*), 1122, and n. (*m*), 1126, 1136, 1143, 1144, 1168, 1169.
(*c*) Above, pp. 1120, 1136, 1143.
(*d*) Above, pp. 1113-1115, 1125.
(*e*) Above, pp. 1136-1138.
(*f*) The Land Transfer Act, 1897, s. 9 (2), applied to registered charges the power of sale and other powers given by the Conveyancing Act, 1881 (stat. 44 & 45 Vict. c. 41, ss. 19-24, except sect. 21 (1, 4)), to mortgagees by deed; so that, as the instrument of charge is a deed,

time of registration of the *charge* the proprietor of the *land* was registered with an absolute title; and he would have to satisfy himself that the power of sale had become exercisable (*g*). To make sure of this, he should inspect the instrument of charge, which is filed in the register, but of which a copy would be found in the certificate of charge (*h*). As regards the estate which the vendor has power under the charge to sell, the sale would be completed by a registered transfer of the land sold from the vendor to the purchaser; the vendor having a statutory authority, as registered proprietor of a registered charge, to transfer the land sold under his power of sale in the same manner as if he were the registered proprietor of the land (*i*). The purchase money may be paid on taking the precautions explained above (*k*); and production is required of the certificate of charge alone, and not of the land certificate (*l*). It is thought that the vendor could be required to give the usual mortgagee's covenant against incumbrances (*m*); although, where an absolute title had been registered, the purchaser under an open contract would not be entitled to any covenants for title (*n*). This being so, it would appear more convenient to take the covenant against incumbrances by a separate deed, which the purchaser could retain in his own possession (*o*); and in this deed an assurance to the purchaser of all the vendor's estate and interest (*p*) in the land sold may also be inserted.

Sale and mortgage of registered land.

Particular difficulties arise where a sale of registered land is to be followed by an immediate mortgage thereof, the mortgagee advancing part of the purchase money (*q*): but to explain these it is necessary to say a few words about the form of a mortgage of registered land.

the chargee will have all these powers in the absence of stipulation to the contrary. See stats. 38 & 39 Vict. c. 87, ss. 22 *sq.*, 27; 60 & 61 Vict. c. 65, s. 9; Land Transfer Rules (1903), 159; above, pp. 1144, 1170, n. (*q*).

(*g*) Above, pp. 313 *sq.*

(*h*) Above, p. 1145, n. (*z*).

(*i*) Stat. 38 & 39 Vict. c. 87, s. 27; see above, pp. 1168, n. (*z*), 1170, n. (*q*).

(*k*) Above, pp. 1126-1132.

(*l*) Stat. 60 & 61 Vict. c. 65, s. 8 (4); above, p. 1118, n. (*p*).

(*m*) Above, pp. 614, 1170.

(*n*) Above, p. 1115.

(*o*) See above, pp. 1144, 1145.

(*p*) See above, p. 1142.

(*q*) Above, p. 587.

Remedies conferred by registered charges on registered land.

The statutory charges on registered land, which were introduced by the Land Transfer Acts (*r*), appear to confer on the chargee fairly adequate remedies for the recovery of the mortgage debt and interest by suing the mortgagor personally (*s*), by exercise of the power of sale (*t*) and by foreclosure (*u*): but they are deficient in respect of the mortgagee's remedy by entry into possession. Where the registered proprietor of the land, who created the registered charge, had himself the legal estate, the registered proprietor of the registered charge appears to have a *legal interest* in the land charged in the nature of a lien thereon for the principal money and interest charged (*x*) and a *legal* right of entry into possession or receipt of the rents and profits of the land charged (*y*): but he obtains no *estate* in the land (*z*), and the Land Transfer Acts do not expressly give to a registered charge the same or the like effect as they give to a registered transfer of the land (*a*). The result is that, although the chargee's rights of lien and entry appear to be clearly paramount to all subsequent registered or unregistered dispositions of the legal estate in the land (*b*), it is not absolutely

(*r*) Stats. 38 & 39 Vict. c. 87, ss. 22-28; 60 & 61 Vict. c. 65, s. 9.

(*s*) Stat. 38 & 39 Vict. c. 87, s. 23. As an office copy of the instrument of charge is now contained in the certificate of charge, and when so contained is made *primâ facie* evidence of the instrument (above, p. 1145, n. (*q*)), the chargee has in his own possession sufficient evidence for enforcing the covenant to pay implied in the charge.

(*t*) Above, pp. 1171, and n. (*f*), 1172, and n. (*i*).

(*u*) Stat. 38 & 39 Vict. c. 87, s. 26, enabling the chargee to enforce a foreclosure or sale of the land charged in the same manner in which he might enforce the same if the land had been transferred to him by way of mortgage. By the Land Transfer Rules (1903), 164, the chargee, on obtaining an order for foreclosure absolute, is entitled to be registered as proprietor of the land, subject to prior charges, if any. And it appears that he will thus obtain the like estate as if the land had been transferred to him for value by the person registered as proprietor thereof at the time of registration of the charge; see *Weymouth* v. *Davis*, 1908, 2 Ch. 169.

(*x*) Stat. 38 & 39 Vict. c. 87, s. 22. It is immaterial that no such interest was previously known to the English law of land; the authority of Parliament is supreme; and all Courts, of law as well as of equity, are bound to give effect to the charge; see *Lord Advocate* v. *Moray*, 1905, A. C. 531, 539.

(*y*) Stat. 38 & 39 Vict. c. 87, s. 25.

(*z*) See *Capital and Counties Bank, Ld.* v. *Rhodes*, 1903, 1 Ch. 631, 650, 657.

(*a*) Above, pp. 1112, n. (*c*), 1114, n. (*p*), 1115, nn. (*q*), (*r*), 1122, n. (*m*), 1125.

(*b*) The opinion has been expressed that a registered charge "does not convey any legal estate so as to enable the mortgagee to maintain an action for the recovery of the land"; Wolstenholme's Forms and Precedents, 249, n. (*a*), 6th ed., citing *Allen* v. *Woods*, 68 L. T.

certain whether they take priority over previous unregistered dispositions of the legal estate, or if they do, whether the right of entry can be asserted without making the person entitled to the legal estate a party to the action (*c*). The question is this:—Since the Acts do not expressly attribute any extinguishing effect to a registered charge, can the registered proprietor of registered land, after he has parted with the legal estate therein by unregistered disposition (*d*), confer by a registered charge a *legal* interest by way of lien and a *legal* right of entry, taking priority over the outstanding legal estate in the land? It is thought that the provision of the Land Transfer Act, 1875 (*e*), which permits of the disposition of registered land by unregistered assurance, *subject to the maintenance of the estate and right of the registered proprietor*, points to the preservation to the registered proprietor of his statutory power to create registered charges, notwithstanding that he has parted with the legal estate in the land; and that, on an exercise in such circumstances of the statutory power of charging, the chargee would still obtain a *legal* interest by way of lien and a *legal* right of entry taking precedence of the outstanding unregistered legal estate in the land. This appears to have been the opinion of Lord Cozens-Hardy, then Cozens-Hardy, L. J., in *Capital and Counties Bank, Ld.* v. *Rhodes* (*f*). And this opinion may be further supported by the contention that the owner of the unregistered legal estate, having allowed the registered pro-

The chargee's right of entry.

143. That case, however, merely decides that, on ejectment by one claiming under an *equitable* title, the person entitled to the legal estate must be a party to the action. But, as above maintained (n. (*x*), p. 1173, above), the chargee has a *legal* right of entry; so this case has no application. And with great respect to the opinion of the learned author cited, it is not necessary to have the legal estate in land in order to maintain successfully an action to recover possession thereof. We have seen that by the common law a man wrongfully disseised of land was divested of all estate therein, and left with a mere right of entry or even of action; above, p. 836. But he could nevertheless well maintain an action to recover possession against all persons whomsoever for the time being in occupation of the land; see Wms. Real Prop. 17 and n. (*n*), 66, 23rd ed., and authorities there cited.

(*c*) See previous note. If the chargee were to sue the mortgagor to get possession of the land charged, it is thought that the latter would be precluded from asserting that the legal estate was outstanding in some third person; *Doe* d. *Ogle* v. *Vickers*, 4 A. & E. 782; *Doe* d. *Hurst* v. *Clifton*, ib. 809, 813; *Doe* d. *Levy* v. *Horne*, 3 Q. B. 757, 760, 766.

(*d*) Above, p. 1126.

(*e*) Stat. 38 & 39 Vict. c. 87, s. 49; above, p. 1126, and n. (*u*).

(*f*) 1903, 1 Ch. 631, 656.

prietor to remain on the register as ostensible owner of the land, with all the registered proprietor's powers of disposition, is estopped from asserting his own rights in derogation of any interest or right created by any exercise of those powers (*g*).

Can a chargee sue on covenants in leases?

There is, however, a more serious objection to the position of a registered chargee of registered land. Where the mortgaged land is let at the time of registration of the charge, the chargee, not acquiring any estate in the land (*h*), does not become an assignee of the mortgagor's legal estate in reversion on the leases. It follows that, although the chargee may enter into receipt of the rents and profits of the mortgaged land (*i*), it is at least extremely doubtful whether he can sue the tenants on the lessee's covenants in the leases, or enforce any proviso for re-entry therein contained (*j*). Besides this, when a registered chargee enforces his right of entry (*k*), he is not in the

(*g*) Above, p. 1132, n. (*x*).
(*h*) Above, p. 1173.
(*i*) Above, p. 1173.
(*j*) Note that in *Capital and Counties Bank, Ld.* v. *Rhodes,* 1903, 1 Ch. 631, 647, 652, the mortgagee's right of enforcing the proviso for re-entry was certainly treated by the C. A. as dependent on his having the legal estate in fee. It is thought that the chargee, having a mere lien on the reversion, could not be held to be an assignee of part of the reversion and so entitled to enforce the covenants and right of re-entry; see Co. Litt. 215 a; *Wright* v. *Burroughes,* 3 C. B. 685; above, p. 389. But he might possibly be considered (when in possession) to be "a person entitled, subject to the term, to the income of the land leased," and to be enabled, as such, to enforce the lessee's covenants and the conditions of re-entry by virtue of sect. 10 of the Conveyancing Act, 1881 (stat. 44 & 45 Vict. c. 41), as regards leases made after that year; see *Turner* v. *Walsh,* 1909, 2 K. B. 484; above, pp. 386, 387; *sed quære,* for he is liable to account for the rents. With respect to the chargee's right, on entry into possession, to enforce the lessee's covenants and the conditions in a lease granted by the mortgagor, after the charge, under sect. 18 of the Conveyancing Act of 1881 (stat. 44 & 45 Vict. c. 41), the opinion has been expressed that he can do so; 2 Key & Elph. Prec. Conv. 919, 8th ed.; 303, 10th ed., citing *Municipal, &c. Building Socy.* v. *Smith,* 22 Q. B. D. 70. That case certainly decided that, when a lease is so granted by the mortgagor after an ordinary mortgage in fee of unregistered land, the mortgagee entering into possession can enforce the lessee's covenants and the conditions in the lease. But the ground of the decision was that, in such circumstances, the lease took effect under the statutory power out of the mortgagee's legal estate in the land, and the mortgagee had therefore the legal reversion. With great respect to the editors of the treatise above cited, it is submitted that it is far from clear that a registered chargee of registered land, having no *estate* at all in the land and no *part* of the reversionary *estate* expectant on such a lease, could successfully maintain an action to enforce the lessee's covenants or the conditions therein contained.
(*k*) Above, p. 1174.

position of a mortgagee in fee of unregistered land, who simply takes possession of his own fee simple, subject only to the mortgagor's equity of redemption, which will be altogether extinguished when the mortgagor has held possession for twelve years without acknowledgment of the mortgagor's title or right to redemption (*l*). The registered chargee, who has entered into possession, has still no definite estate in the land; though he seems to have an interest analogous to that of a tenant by *elegit*. He has no right, on entry into possession, to be registered as proprietor of the land; the mortgagor therefore remains the registered proprietor and can still exercise all the registered proprietor's powers of transfer or charge. And when the chargee has been in possession for twelve years without acknowledgment of the mortgagor's title, he does not obtain *ipso facto* the full ownership of the land: but he must first apply to the Court for an order for rectification of the register by entry of his name as proprietor of the land. And it does not appear that he can claim such an order as his undoubted right; the granting thereof appears to be in the judicial discretion of the Court, which is to be exercised "subject to any estates or rights acquired by registration for valuable consideration in pursuance of the Land Transfer Acts" (*m*). It seems, therefore, that persons claiming under registered transfers for value or charges made by the mortgagor subsequently to the chargee's entry into possession might be allowed to have a further right of redemption, notwithstanding that the chargee had held possession for twelve years. And in any case the chargee would be saddled with the burden of proof that he is entitled to have the register rectified as he desires; and he would have to pay the costs of his application out of his own pocket. For these reasons it appears that an intending mortgagee of registered land cannot be advised to rest satisfied with a registered charge alone (*n*). He must in some way obtain such a security as will

Chargee in possession has no estate.

(*l*) Stats. 3 & 4 Will. IV. c. 27, ss. 28, 34; 37 & 38 Vict. c. 57, ss. 7, 9; *Kinsman* v. *Rouse*, 17 Ch. D. 104; *Forster* v. *Patterson*, ib. 132.

(*m*) See stats. 38 & 39 Vict. c. 87, s. 95; 60 & 61 Vict. c. 65, s. 12.

(*n*) An exception may be made where the proposed loan is so much below the value of the land that it is practically impossible that the amount secured would not be realised by a forced sale. It is thought that trustees proposing to invest trust money on mortgage of registered land could not be advised to rest satisfied with a registered charge alone, where they intend to advance the full amount of that proportion of the value which trustees are generally authorised to

vest in him the mortgagor's estate; or he may be powerless against tenants under leases prior to the charge in case he be obliged to enter into possession, and he will be at a great disadvantage in the matter of acquiring an absolute title by twelve years' possession.

Mortgage of registered land by transfer.

There are two ways of making such a mortgage; and each of them is much more disadvantageous to the mortgagor than an ordinary mortgage of unregistered land. The first, which is that most favourable to the mortgagee, is for the mortgagee to take a registered transfer of the land offered as security, and to be entered in the register as proprietor of the land, the mortgagor's right of redemption being secured to him by an unregistered deed (*o*). The mortgagor must, of course, put a caution on the register, so as to be informed of any registered dealing with the land: but the mortgagee cannot safely allow him to enter a restriction on registered dealings therewith without his consent, as this would hamper the exercise of the mortgagee's power of sale. The result is that the mortgagor cannot, without redeeming, effectively control the exercise by the mortgagee of the statutory powers of disposition given to the registered proprietor of land; and the mortgagee may execute registered charges as well as transfers to the prejudice of the equity of redemption. The second manner of mortgaging registered land is for the mortgagee to take a registered charge coupled with an unregistered mortgage of the mortgagor's estate in the land charged (*p*): but in this case it is necessary,

Mortgage by registered charge coupled with an unregistered mortgage of the estate.

lend on mortgage of unregistered land; see stat. 56 & 57 Vict. c. 53, s. 8 (1); *Blyth* v. *Fladgate*, 1891, 1 Ch. 337, 353, 354; *Re Turner*, 1897, 1 Ch. 536.

(*o*) See Davidson's Concise Precedents, 294 and n., 18th ed.; 312 and n., 19th ed.; 321, n. (*n*), 20th ed.; 2 Key & Elph. Prec. Conv. 917, 920, 8th ed.; 282, 9th ed., where it is explained that the Inland Revenue authorities claim that such a transfer must bear the same stamp as a conveyance on sale (owing to this objection, apparently, this method of mortgaging registered land is not discussed in the 10th ed. pp. 304-306); Encyclopædia of Forms, viii. 523 and n. It is thought that, in fairness to the mortgagor, the unregistered deed should be executed in duplicate; so that he may retain some evidence in his possession of his right of redemption.

(*p*) See 2 Key & Elph. Prec. Conv. 920, 923, 8th ed.; 281, 286, 9th ed.; 304, 310 (where the conveyance subject to redemption is included in the registered charge), 10th ed.; Encyclopædia of Forms, viii. 523, n., 526. The mortgagee cannot safely dispense with a registered charge; as he must be enabled, in the event of his exercising his power of sale, to execute a transfer, capable of registration, to the purchaser; see stat. 60 & 61 Vict. c. 65, s. 16 (2); above, pp. 1115,

in order to prevent the legal estate so assured to the mortgagee from being impaired (*q*) or extinguished (*r*) by a subsequent registered charge on or transfer of the land, that a restriction shall be entered in the register preventing any registered dealings (*s*) with the land charged without the consent of the mortgagee. And as a further precaution against such dealings, the mortgagee should stipulate for possession of the land certificate (*t*). It is also suggested, in the mortgagee's interest (*u*), that a mortgage of this kind should contain a covenant by the mortgagor to transfer the mortgaged land to the mortgagee (subject to redemption) in case the mortgagee shall enter into possession; also a power of attorney from the mortgagor to the mortgagee enabling him to execute such transfer to himself in the mortgagor's name. These precautions will sufficiently secure all the mortgagee's remedies, so long as no transfer of the land from the mortgagee to a third person is registered: but if the mortgagor should desire to make such a transfer, the whole process must be gone through again; so that, after the transfer has been registered with the mortgagee's

1166. A mortgagee intending to take a security of this kind must be careful to obtain an abstract of all unregistered dispositions of the land, and to make the same searches as if the land were not registered; see above, pp. 475, 477, 547 *sq.*, 1125, 1157. In the case of a mortgage of registered leasehold land, the unregistered mortgage will be by underlease; see *Weymouth* v. *Davis*, 1908, 2 Ch. 169.

(*q*) Above, p. 1174.

(*r*) Above, p. 1126.

(*s*) If, as suggested below, the mortgagee insist on obtaining a covenant for a transfer to himself in case of his entry into possession, coupled with a power of attorney to effect such transfer, it is necessary that he should also insist on a restriction against any registered dealing without his consent; as he must obtain a fresh covenant to make or concur in the transfer to himself, and a fresh power of attorney, from every person whom he may permit to be registered as proprietor either of the land or of a subsequent charge thereon. If the mortgagee be content to do without such covenant, he need only procure a restriction against registering, without his consent, any transfer of the land made either by the registered proprietor of the land or by the registered proprietor of a subsequent registered charge in exercise of his power of sale.

(*t*) See above, pp. 1116, n. (*u*), 1118, n. (*p*).

(*u*) It is eminently desirable for the mortgagee, if obliged to take possession, to be enabled to procure himself to be registered as proprietor of the land; above, p. 1176. But the covenant and power of attorney here suggested, with the restrictions necessary to maintain their efficacy, place very serious obstacles in the way of the mortgagor's obtaining a loan on the security of a subsequent mortgage of the land. If, however, such covenant and power of attorney be inserted in the mortgage deed, they may as well be made to extend to the case of foreclosure; above, p. 1173, and n. (*u*).

consent (*x*), and the mortgagee's legal estate extinguished thereby (*y*), he may take back a new legal estate from the transferee, and obtain a new covenant for transfer to himself in case of his entry into possession and a new power of attorney from the transferee to effect such transfer. And of course the restriction on all registered dealings without the mortgagee's consent must be carefully maintained. Registered charges subsequent to the first do not appear to deprive the first mortgagee of the legal estate assured to him by unregistered disposition (*z*): but if the suggestion made above be adopted, he should not allow them to be registered without procuring the chargee to enter into the covenant and give the power of attorney above mentioned (*a*); and he must further stipulate for the entry of a restriction on any transfer of the charge without his consent, in order that he may be enabled to procure the like covenant and power of attorney from any registered transferee of the charge. And he must be careful to maintain a restriction on any dealing with the land, or any subsequent charge thereon being registered without his consent. These transactions, of course, entail increased expense, which falls on the mortgagor.

Mortgages of land registered with a qualified or possessory title.

The above remarks apply to mortgages of land registered with an absolute title. Where the land proposed to be mortgaged is registered with a qualified or possessory title, the estates or interests paramount to the title registered (*b*) must be got in and mortgaged by a common assurance outside the register (*c*): and in addition, the estate in the land which is the subject of the registered title must be mortgaged in the same manner as if the title registered were absolute.

Registered charge coupled with an unregistered mortgage by demise for a long term.

A variation of the second form of mortgaging registered freehold land has lately been suggested, in which a mortgage by demise for a long term of years is substituted for the unregistered mortgage in fee (*d*). This gives the mortgagee a

(*x*) The restriction prevents the transfer from being registered without the mortgagee's consent.
(*y*) Above, p. 1126.
(*z*) Above, p. 1174.
(*a*) Above, p. 1178, and notes (*s*), (*u*).
(*b*) Above, pp. 1115, nn. (*q*), (*r*), 1126.
(*c*) See above, pp. 1117, 1119, 1137, 1143-1147.
(*d*) 2 Key & Elph. Prec. Conv. 281, 282, 288, 9th ed.; 306, 312 (where the demise is included in the registered charge), 10th ed.

legal estate in the term (*e*), which is practically as effective for the purposes required (*f*) as an estate in fee, and it enables notice of the lease to be entered in the register. By sect. 50 of the Land Transfer Act, 1875 (*g*), when such notice is so registered, every registered proprietor of the land and every person deriving title through him (excepting proprietors of incumbrances registered prior to the registration of such notice) will be deemed to be affected with notice of the lease as being an incumbrance on the land in respect of which the notice is entered. And it appears from sect. 49 to be the intention of the Act that by the registration of such notice, the estate created by the lease shall be protected from being impaired by any act of the registered proprietor (*h*). Besides this, the Land Transfer Act, 1897 (*i*), has expressly prohibited a term created for mortgage purposes from being registered as a lease; so it may be urged that its validity was not meant to be impaired by subsequent registered dispositions by the grantor or his successors. These appear to be weighty reasons why the Courts may hold that the result of the above provisions is to preserve the legal estate in the term granted from being extinguished by the effect of a subsequent registered transfer for value from the registered proprietor of the land (*k*). And for these reasons, apparently, it has been asserted that the mortgagee of registered land by an unregistered mortgage for a long term will have the

(*e*) The lease, being created for mortgage purposes, is not required to be registered in order to pass the legal estate in the term granted; see stats. 38 & 39 Vict. c. 87, s. 11; 60 & 61 Vict. c. 65, ss. 20 (1), 22 (6, g) and First Schedule; Land Transfer Rules (1903), 68-70; L. T. R. (1908), IV.; Wms. Real Prop. 551, 566, 23rd ed.

(*f*) Above, pp. 1173-1177.

(*g*) Stat. 38 & 39 Vict. c. 87.

(*h*) See sect. 49, partly stated above (pp. 1125, 1126), and further enacting that any person entitled to or interested in any unregistered estates, rights, interests or equities in registered land may protect the same from being impaired by any act of the registered proprietor by entering on the register such notices, cautions, inhibitions or other restrictions as are in this Act in that behalf mentioned. It is, however, submitted that these words may well be construed as enacting merely that the owner of any unregistered estate shall have *such* protection against its being impaired by any act of the registered proprietor as is thereinafter mentioned, *i.e.*, such as is given by the express provisions of the Act (sects. 50-58), defining the exact effect of registered notices, cautions, inhibitions and restrictions. This certainly seems to be the meaning of the enactment as regards unregistered estates protected by cautions.

(*i*) Stat. 60 & 61 Vict. c. 65, First Schedule, amending 38 & 39 Vict. c. 87, s. 11; above, n. (*e*).

(*k*) Above, pp. 1126, 1178.

legal estate *during the term;* and it has been suggested that there is, therefore, no necessity, on taking an unregistered mortgage for a term, to register any restriction on the mortgagor's statutory powers of disposition (*l*). But with great deference to this opinion, it is respectfully submitted that it is not so perfectly clear that the enactments cited have this effect as to make it advisable for the mortgagee to omit that precaution. Sect. 50 of the Act of 1875 does not say that the lease, whereof notice is so registered, *shall be* a registered incumbrance (in which case it would be expressly preserved from the effect of a registered transfer for value (*m*)), but merely provides that the transferee *shall be affected with notice* of the lease as an incumbrance on the land. These words would be satisfied if, on a subsequent registered transfer of the land, the like effect were produced as when a purchaser takes a registered conveyance of land in Middlesex with notice of a prior unregistered assurance, which originally passed the legal estate (*n*); that is to say, if the transferee were to acquire the entire legal estate in fee simple subject *in equity* to the lease. And it is submitted that this construction gives effect both to the terms of sects. 30 and 35 and to those of sect. 50 of the Act of 1875, and that it is at least possible that the Courts may adopt this view. But such a construction would not answer the mortgagee's purpose of keeping the legal estate in himself unimpaired during the continuance of his security (*o*). And if we seek to rely on the argument that the intention of the Act of 1897 must have been that terms created for mortgage purposes (being incapable of registration) shall not be affected by subsequent registered dispositions, we shall be obliged to push it to this extent, that such terms will not be extinguished or impaired by such dispositions even though no notice of them be registered. Such a conclusion, however, robs us of any support from sect. 49 of the Act of 1875, which seems to indicate clearly that estates created off the register shall only be preserved from being impaired by the notices, &c. therein mentioned (*p*). And it appears to be entirely contrary to the

(*l*) 2 Key & Elph. Prec. Conv. 282, 9th ed.; 305, 306, 10th ed.

(*m*) See stat. 38 & 39 Vict. c. 87, ss. 30, 35.

(*n*) Above, pp. 361-363.

(*o*) See above, pp. 1175, 1177, 1179.

(*p*) See note (*h*), above, p. 1180; Cozens-Hardy, L. J., *Capital and Counties Bank, Ld.* v. *Rhodes*, 1903, 1 Ch. 631, 656.

policy of the Act of 1897 that a transferee under a registered transfer should take an estate subject to an unregistered mortgage for a long term of years of which *no* notice has been registered. It seems clear that under the Act of 1875 alone all long terms not noticed on the register, either by being registered as leases or by notice of them being registered, would be extinguished by a subsequent registered transfer for value of the land (*q*). And it may surely be argued that when the Act of 1897 deprived terms created for mortgage purposes of all capacity for registration, that was not meant to invest them with any independent validity or inviolability, but the very reverse was intended. We are driven back, therefore, to the words used in sect. 50 of the Act of 1875 as the sole support for the opinion that such terms (when notice of them is registered) are not in any way affected by any subsequent registered disposition of the land. Having regard to these considerations, it does not seem to be absolutely safe (so long as the point at issue shall not have been actually decided) to dispense, on taking an unregistered mortgage for a long term, with the entry on the register of the same restrictions as would be required if the unregistered mortgage were in fee (*r*). And, of course,

(*q*) Above, p. 1126.

(*r*) Above, pp. 1177, 1179. It may perhaps be objected that, if the legal estate in the term granted by a lease, whereof notice is registered, can be extinguished by a subsequent transfer for value of the freehold, then tenants for long terms granted for other than mortgage purposes have no security that they will retain the legal estate in such terms. But it is thought that under the Act of 1875, as under that of 1897, long terms of years, which are themselves registered as leases, become "incumbrances entered in the register," and are thus protected by the express words of sects. 30 and 35 of the Act of 1875 from being extinguished by the effect of a registered transfer of the freehold for valuable consideration. At all events if this be not so, then long terms, which are themselves registered as leasehold interests, must be extinguished by the effect of a subsequent registered transfer for value of the freehold, unless notice of them were registered under sect. 50 of the Act of 1875. No doubt terms of years in registered land can only be created by an unregistered *disposition* under sect. 49 of the Act of 1875: but the protection thereby purported to be afforded (see above, p. 1180, and n. (*h*)) is expressly conferred, not on all estates, &c. created by any unregistered disposition, but on *unregistered estates, rights, interests or equities* in registered land. It appears therefore that the notices mentioned in sects. 49 and 50 were intended (or at least originally intended) to apply only to long terms not registered as leasehold interests; and it is just the difference in the expressions used in sects. 30, 35 and in sect. 50 which creates the difficulty. Under the Land Transfer Rules (1903), No. 63, where a lease of registered land is itself registered as such, it is (subject to any valid objection as therein mentioned) to be noted against the title to the freehold *in the same manner* as notices of leases have to be

if this precaution cannot safely be omitted, it would be preferable to supplement the registered charge by an unregistered mortgage *in fee*.

Sale followed by a mortgage of registered land.

Mortgages of registered land being generally carried out in one of the two modes of assurance above described (*s*), the problem is how to combine such a mortgage with a conveyance on sale when it is intended to pay part of the price with the mortgage money. There is no difficulty if the mortgage is to be secured by a registered transfer of the land charged to the mortgagee. The transfer is taken direct from the vendor to the mortgagee at the purchaser's request; and if the title has been cleared, all outstanding estates or interests duly got in and a priority notice (*t*) obtained, the mortgage money can safely be paid on receipt of the instrument of transfer and the mortgage deed, duly executed by all necessary parties, and of the land certificate with the priority notice endorsed (*u*). But if the mortgage is to be taken by registered charge, coupled with an unregistered mortgage of the purchaser's estate in the land, the transaction is complicated. As regards the proposed registered charge, the Land Transfer Act, 1897 (*x*), enables a person, on whom the right to be registered as proprietor of land has been conferred by an instrument of transfer in accordance with the Acts, to charge the land before he is himself registered as proprietor; and a charge so made shall have the same effect as if the person making it were registered as proprietor. The purchaser can therefore execute an effectual instrument of charge

entered under sects. 50, 51 of the Act of 1875. This seems to show that the case does not fall directly within those sections; as it has been considered expedient to prescribe that it shall be dealt with by *similar* procedure. We may remark that, if a long term granted for mortgage purposes and protected by entry of notice thereof in the register cannot be extinguished at law by the effect of a subsequent registered transfer of the freehold for value, it would be possible to make an effectual mortgage, off the register, of registered land by demise for a long term alone, and registration of notice of the term; especially if an assignment of a long term originally created for mortgage purposes does not require to be registered in order that it may pass the legal estate; see above, p. 1180, n. (*e*). But this result does not appear to be in accordance with the general policy of the Act of 1897.

(*s*) Above, p. 1177.

(*t*) Above, p. 1128.

(*u*) Above, pp. 1130, 1132.

(*x*) Stat. 60 & 61 Vict. c. 65, s. 9 (6); Land Transfer Rules (1903), 104, 105.

after the transfer to himself has been *executed* and before it is *registered;* and the two instruments (of transfer and charge) can be handed in together for registration. The difficulty of the transaction is how to secure that the mortgagee shall obtain the unregistered legal estate; as if that be conveyed to him before the registration of the transfer to the purchaser it will be extinguished by the effect of such transfer (*y*). It is therefore necessary that the purchaser, having taken a grant of the vendor's legal estate either in the instrument of transfer or by a separate assurance (*z*), shall execute an unregistered mortgage of the land to the mortgagee, containing all provisions proper on a mortgage of registered land in the second manner above described (*a*), and also a covenant by the purchaser that after he has been registered as proprietor of the land, he will grant it to the mortgagee, subject to redemption. The mortgage money is advanced on receiving this deed and the instrument of charge, together with the application for the necessary restriction (*b*), all duly executed by the purchaser (*c*): but after the registration (*d*) of the purchaser as proprietor of the land,

(*y*) Above, pp. 1126, 1181, 1182, and n. (*r*).
(*z*) Above, pp. 1129, and n. (*i*), 1142, 1145.
(*a*) Above, p. 1177.
(*b*) Above, p. 1178.
(*c*) It is thought that this may be safely done, especially if (as above suggested, p. 1178) the mortgage deed contain a covenant by the purchaser to transfer the land to the mortgagee in case of the mortgagee's entry into possession, and the necessary restriction be entered in the register to prevent the purchaser from registering any transfer or charge without the mortgagee's consent.

Execution of the deed of confirmation as an escrow.

(*d*) It is thought that this deed may be executed at any time after, but not before, the transfer to the purchaser has been delivered for registration at the Office of Land Registry and the necessary entries consequent thereon have been settled; see above, pp. 1127, 1130. It is thought that the mortgagee cannot safely accept an undated deed of conveyance executed by the mortgagor, before his registration, as an escrow, and given to the mortgagee's solicitor to be delivered and dated after the registration. In the first place, the mortgagor has not, at the time of the execution of the deed as an escrow, the power and ability to make the necessary conveyance; for he has not then the legal estate, which he desires to assure—viz., that which will be vested in him on execution of the statutory *power;* see *Butler and Baker's case,* 3 Rep. 35 b; Shepp. Touch. 59; above, p. 1126, and n. (*y*). And it is well established that at law a man cannot make a valid conveyance of any property, which he has not, but merely expects to have; see Wms. Real Prop. 70, n. (*l*), 23rd ed.; Wms. Pers. Prop. 98, 99, 17th ed., and authorities there cited; *Re Ellenborough,* 1903, 1 Ch. 697. It is thought that this rule (and, we may add, the rule prohibiting the grant of a freehold estate to commence at a future time; *Savill Bros., Ld.* v. *Bethell,* 1902, 2 Ch. 523, 540) cannot be evaded by such a simple contrivance as to execute a deed as an escrow,

he must execute a further deed conveying the legal estate to the mortgagee in pursuance of his covenant (*e*). It has been suggested that, if the unregistered mortgage be taken by demise for a long term of years and notice of such lease be registered, any confirmatory deed will be unnecessary (*f*). But owing to the doubt above mentioned (*g*) it is respectfully submitted that this course is not perfectly safe.

Sale and mortgage of unregistered land situate

Somewhat similar difficulties arise in the case of a sale of unregistered land situate in a compulsory registration district, when a mortgage is to be made to secure part of the purchase

to be finally delivered when the expected estate shall have vested in the grantor or when the grant is desired to commence. Secondly, it is thought that after final delivery the deed would relate back to the time of its execution as an escrow; Shepp. Touch. 59; *Edmunds* v. *Edmunds*, 1904, P. 362, 374. And it is well settled that a deed takes effect from the time of its delivery, and not from its date, and that a party to the deed is not estopped by the date written therein from showing that it was delivered at some other time; Plowd. 491; *Goddard's case*, 2 Rep. 4; *Clayton's case*, 5 Rep. 1; *Oshey* v. *Hicks*, Cro. Jac. 263; Co. Litt. 46 b; Shepp. Touch. 72; *Stone* v. *Bale*, 3 Lev. 348; *Doe* d. *Whatley* v. *Telling*, 2 East, 257; *Hall* v. *Cazenove*, 4 East, 477; *Steele* v. *Mart*, 4 B. & C. 272; *Browne* v. *Burton*, 17 L. J. Q. B. 49; *Jaynes* v. *Hughes*, 10 Ex. 430. Thirdly, it is thought that, although the insertion of the date of a deed after its execution is in general an immaterial alteration not sufficient to avoid the deed (*Crediton* v. *Exeter*, 1905, 2 Ch. 455), in the case under consideration the date is material, and to insert it after execution as an escrow might have the effect of avoiding the deed; see *Davidson* v. *Cooper*, 13 M. & W. 343, 352; *Suffell* v. *Bank of England*, 9 Q. B. D. 555, 559, 571; *Ellesmere Brewery Co.* v. *Cooper*, 1896, 1 Q. B. 75; *Re Howgate and Osborn's contract*, 1902, 1 Ch. 451, 454; and consider *Société Générale de Paris* v. *Walker*, 11 App. Cas. 20. The mortgagor, however, may well give a power of attorney to the mortgagee authorizing him to execute the necessary deed of conveyance, after the mortgagor's registration, in the mortgagor's name; and such a power of attorney is usually inserted in the mortgage deed; see 2 Key & Elph. Prec. Conv. 283, 291, 9th ed.; 306, 314, 10th ed.

Date of a deed.

(*e*) It is thought that, when registered land is let on lease subject to covenants by the lessee and the usual condition of re-entry, and the freehold reversion is transferred by registered transfer, the transferee will be an assignee of the reversion within the meaning or the equity of stat. 32 Hen. VIII. c. 34, and so enabled to enforce the lessee's covenants and the condition of re-entry; for although he appears not to take the transferor's estate but to come in by a new title (above, p. 1126, and n. (*y*)), he claims by the act of the transferor; see Co. Litt. 215; Bac. Abr. Covenant (E. 6); *Lincoln College's case*, 3 Rep. 58, 62 b; *Williamson* v. *Hancock*, 1 Mod. 192, 193; *Glover* v. *Cope*, 3 Lev. 326; Skinner, 305, 307; *Whitton* v. *Peacock*, 3 My. & K. 325. The transferee would certainly be entitled to the rights and remedies given by the Conveyancing Act, 1881 (stat. 44 & 45 Vict. c. 41), s. 10; see above, pp. 384-387.

(*f*) 2 Key & Elph. Prec. Conv. 283, 293, 9th ed.; 306, 10th ed.

(*g*) Above, pp. 1179-1182.

in compulsory registration district.

money; as the legal estate does not pass under a conveyance completing such a sale unless or until the purchaser is registered as proprietor of the land (*h*). Various devices have been suggested to meet these difficulties (*i*): but it is thought that the plan most favourable for the mortgagee is to take a conveyance of the land sold direct from the vendor, with the concurrence of any other necessary parties, by way of mortgage to secure the proposed loan, the mortgage money being paid to the vendor and the right of redemption reserved to the *vendor* (*k*), his heirs and assigns, but a proviso being inserted that the vendor shall not be personally liable to repay the money, and the purchaser entering into the usual covenants for payment of the principal money advanced and the interest thereon. It is thought that such a deed will certainly pass the legal estate to the mortgagee (*l*). The vendor may then convey the equity of redemption to the purchaser. If after this it be desired to register the land, the mortgagee will occupy the position of an incumbrancer prior to first registration (*m*); and it is thought that his legal estate and interest under his incumbrance will remain paramount to and unaffected by the registration of the purchaser as proprietor of the land (*n*), and that he will be enabled to register himself as proprietor of the incumbrance without losing these advantages (*o*). There is no disadvantage in this plan to the purchaser, if he is to be registered with an absolute title as proprietor of the land; for such registration will have the effect of extinguishing any outstanding equitable interests adverse to his own. If, however, the purchaser is to be registered with a possessory title or is not to be registered, he will, as he has had a conveyance of a mere equitable estate, take subject to any prior equitable interests which may have affected the land sold in the vendor's hands and have not been duly assured to the mortgagee or to himself (*p*). But it appears

(*h*) Above, pp. 367 *sq.*

(*i*) 2 Key & Elph. Prec. Conv. 283, 284, 9th ed.; 307, 10th ed.; Prideaux, Prec. Conv. ii. 803, 19th ed.; Encyclopædia of Forms, viii. 523, n.

(*k*) It is thought that, if the right of redemption were reserved to the purchaser, the legal estate would not pass to the mortgagee; see above, pp. 367, 368.

(*l*) See above, pp. 367, n. (*f*), 368.

(*m*) Above, pp. 1120 *sq.*, 1165 *sq.*

(*n*) Above, pp. 1114, n. (*p*), 1115, nn. (*q*), (*r*), 1121, 1126, 1165 *sq.*

(*o*) Above, p. 1121.

(*p*) Above, p. 453, and n. (*y*).

that the purchaser must run this risk if the parties propose to evade the necessity for registration. If the above plan cannot be adopted, as where the vendor is selling under a trust for (*q*) or power of sale, or under the power of sale given by the Settled Land Acts, or has stipulated that the purchaser shall be registered, the like procedure must be followed as in the case of a mortgage of land already registered (*r*); that is to say, after the conveyance of the land sold to the purchaser, he must execute an unregistered mortgage thereof to the mortgagee, covenanting to execute (after his registration) to the mortgagee a transfer of the land (subject to redemption), or a registered charge thereon coupled with a conveyance of the legal estate, according to the form of security agreed to be adopted. And such transfer, or charge and conveyance, must be executed accordingly (*s*). But in this case, unless payment of the purchase money can be delayed until the registration of the purchaser's title is ready for completion (*t*), the mortgagee is exposed to the dangers involved in advancing his money against

(*q*) It is suggested that, where the vendor holds the legal estate on trust for sale, as also where he is absolute owner, the following course may be taken:—Let the sale be completed by a conveyance to the purchaser in common form. This will leave the legal estate in the vendor on trust for the purchaser. Then let the vendor and purchaser together mortgage the land to the mortgagee, the vendor concurring as a bare trustee of the legal estate at the purchaser's direction, and the right of redemption being reserved to the purchaser, his heirs and assigns. It is submitted that this deed would be a pure mortgage and would not be "a conveyance executed on sale, by virtue whereof there is conferred or completed a title under which an application may be made for registration as first proprietor of land"; see above, pp. 367, n. (*f*), 368. The previous conveyance to the purchaser would have already conferred on him a complete title to be registered as first proprietor of the land; above, p. 368, n. (*i*). It is thought that, if after this the purchaser's title should be registered, the mortgagee would be in the position of an incumbrancer prior to first registration; above, p. 1186.

(*r*) Above, pp. 1183-1185, and n. (*d*).

(*s*) 2 Key & Elph. Prec. Conv. 283, 284, 294-298, 9th ed.; 307, 315-320, 10th ed. Under the Land Transfer Rules (1903), 96, the purchaser, having (with the vendor's consent) the right to apply for registration as first proprietor of the land, may, before he is so registered, transfer or charge the land in the same manner as if he were so registered; and such transfer or charge will, when completed by registration, have the same effect as if the person making it were so registered. And under rule 117, a priority notice may be obtained in favour of such a transfer or charge.

(*t*) See above, pp. 371, 372; and see previous note as to priority notice. On a sale by auction the vendor would stipulate for payment of the purchase money before the purchaser's registration.

the conveyance of a mere equitable estate (*u*). He may be willing to run this risk if he be making the loan on his own account: but he can scarcely be advised to take it where he is a trustee proposing to invest the trust money on the mortgage.

The writer must here conclude. In the chapter now ended he has not attempted more than to examine the leading principles, which should guide the conveyancer instructed to carry out a sale of registered land. The subject is so intricate that it would require a whole treatise to expound it fully.

(*u*) Above, p. 453, and n. (*q*).

CHAPTER XXI.

OF THE DEATH DUTIES.

§ 1. Of probate duty and legacy duty.
§ 2. Of succession duty, account duty and temporary estate duty.
§ 3. Of estate duty.

The death duties.

We now come to the subject of the death duties, by which term the taxes imposed on the succession to property after death are commonly referred to. As we have seen (*a*), it is the duty of the conveyancer advising the purchaser to see that none of these remains charged on the lands sold. A short account of these duties will not therefore be out of place.

§ 1.—*Of probate duty and legacy duty.*

Probate duty.

The earliest of the death duties was that commonly called probate duty (*b*); which was a stamp duty imposed on the grant of probate of a will or of letters of administration in respect of the value of the deceased person's personal estate situate within the jurisdiction of the Court granting the probate or administration (*c*). Wills of real estate not formerly requiring to be proved (*d*), probate duty was never payable in respect of any interest in land to which the testator was entitled as real estate, whether at law or in equity (*e*). It was not therefore payable on lands directed by will to be sold, or settled by the testator himself on a revocable trust for sale and payment to himself of the proceeds (*f*). But probate duty was

(*a*) Above, p. 162.
(*b*) See Hanson, Death Duties, 1, 10, 4th ed.
(*c*) 1 Wms. Exors. pt. i. bk. vii. pp. 617 *sq.*, 7th ed.; Wms. Pers. Prop. 492, 17th ed.
(*d*) Above, p. 147.
(*e*) See 1 Wms. Exors. pt. i. bk. vii. pp. 617 *sq.*, 7th ed.; Hanson, Death Duties, 274, 4th ed.; 798, 6th ed.
(*f*) *Matson* v. *Swift*, 8 Beav. 368, 9 Jur. 521.

payable in respect of any equitable interest in lands which was absolutely impressed with the character of personalty, as the interest of a vendor of lands (*g*), or of a *cestui-que-trust* under an absolute trust for sale (*h*), the interest of a partner in real estate forming part of the partnership assets (*i*), or real estate purchased under an order in Lunacy with the accumulations of the income of a lunatic's personalty and declared in the conveyance to belong to him as personal estate (*k*). Leaseholds for years, being chattels, were of course subject to probate duty (*l*). Purchasers investigating a title to any personalty, which has passed by will or on intestacy, are not concerned to inquire whether the probate duty was duly paid. Their only care need be to obtain production of the probate copy of the will or the letters of administration; neither of which would be issued until the duty was paid (*m*). Probate duty was payable by the executor or administrator (*n*): it was not made a charge on the property according to the value whereof it was levied. But the statute, by which personalty subject to a general power of appointment exercised by will was first made liable to probate duty, provided that the duty so imposed should be a charge on the property in respect of which it was payable (*o*). We may notice that an executor may lawfully dispose of his testator's chattels, whether real or personal, before obtaining probate (*p*); he may be obliged to do so to obtain money to pay the necessary duty. In such case a purchaser from him would take the property sold free from any charge of probate duty: but if it were subsequently necessary to prove the executor's title to make the sale, the probate of the will would be the only evidence available in a court of justice (*q*). Probate duty was abolished by the Finance Act, 1894 (*r*), as regards property chargeable with the estate duty thereby introduced, and

Leaseholds.

Purchasers need not inquire as to payment of probate duty.

(*g*) *A.-G.* v. *Brunning,* 8 H. L. C. 243, 6 Jur. N. S. 1083.
(*h*) *A.-G.* v. *Lomas,* L. R. 9 Ex. 29.
(*i*) *A.-G.* v. *Hubbuck,* 13 Q. B. D. 275.
(*k*) *A.-G.* v. *Ailesbury,* 12 App. Cas. 672.
(*l*) 1 Wms. Exors. pt. i. bk. vii. p. 622, n., 7th ed.
(*m*) See stats. 55 Geo. III. c. 184, ss. 38, 45, 47; 44 Vict. c. 12, s. 30.
(*n*) Stat. 55 Geo. III. c. 184, s. 37.
(*o*) Stat. 23 & 24 Vict. c. 15, ss. 4, 5.
(*p*) 1 Wms. Exors. pt. i. bk. iv. ch. i. § 2, pp. 302 *sq.*, 7th ed.; above, p. 213, n. (*z*).
(*q*) Ibid.; *Pinney* v. *Pinney,* 8 B. & C. 335; *Brazier* v. *Hudson,* 8 Sim. 67; *Pinney* v. *Hunt,* 6 Ch. D. 98.
(*r*) Stat. 57 & 58 Vict. c. 30, ss. 1, 24, and First Schedule.

such estate duty was substituted therefor in the case of persons dying *after* the 1st of August, 1894.

Legacy duty.

Legacy duty is payable on all legacies, whether given specifically or in one sum or by way of annuity or in any other form, which are payable out of the testator's own personal estate, or any personal estate over which he had a power of appointment; on all gifts of the residue or any share of the residue of a testator's personal estate; and on any personal estate or share therein devolving upon intestacy under the Statutes of Distribution (*s*). But appointments by will under a limited power of appointment, to which any sum of money was subjected by marriage settlement for the benefit of any persons specially named as the objects of the power or of the testator's issue, were exempted from legacy duty (*t*). Leaseholds, as chattels, were originally subject to legacy duty: but by the Succession Duty Act, 1853 (*u*), they were made liable to succession duty instead. Gifts made by will of real estate *in specie* were never chargeable with legacy duty. But legacy duty was payable on any legacy (whether given in one sum or by way of annuity or in any other form (*x*)) charged upon the testator's real estate or given out of any moneys to arise by the sale, mortgage or other disposition of his real estate, and also on any bequest of the whole or any share of the clear residue (after deducting debts, funeral expenses, legacies and other charges first made payable thereout, if any) of the moneys to arise from the sale, mortgage or other disposition of any real estate directed (*y*) by will to be sold, mortgaged or otherwise

Leaseholds.

Legacies charged on real estate, or the proceeds of sale thereof.

(*s*) Stats. 36 Geo. III. c. 52, s. 2; 55 Geo. III. c. 184, Sched. pt. iii., amended by 8 & 9 Vict. c. 76, s. 4; and 51 & 52 Vict. c. 8, s. 21 (2); Wms. Pers. Prop. 500, 17th ed. The rates of legacy duty are the same as those of succession duty; see below.

(*t*) Stat. 8 & 9 Vict. c. 76, s. 4. Such appointments, however, give rise to a liability to succession duty; see below.

(*u*) Stat. 16 & 17 Vict. c. 51, s. 19.

(*x*) Stat. 8 & 9 Vict. c. 76, s. 4, replacing 45 Geo. III. c. 28, s. 4; 36 Geo. III. c. 52, s. 7; see *A.-G.* v. *Wade*, 1910, 1 K. B. 703.

(*y*) If the direction for sale were absolute, legacy duty became payable, notwithstanding that the beneficiary elected to take the property *in specie*, as real estate; *A.-G.* v. *Holford*, 1 Price, 426; *Williamson* v. *Adv.-Gen.*, 10 Cl. & Fin. 1. If the direction for sale were discretionary, and no sale was made, no legacy duty was payable; *A.-G.* v. *Mangles*, 5 M. & W. 120; *Adv.-Gen.* v. *Smith*, 1 Macq. 760. The decisions were conflicting on the question whether duty was payable when the direction for sale was discretionary, and a sale took place in consequence. If in such case the proceeds of sale became liable to be re-invested in the purchase of land, or applied in paying off incum-

disposed of (*z*). This duty was not charged by statute on the real estate in question (*a*), but was made payable by the trustees to whom the real estate should be devised, or, if there should be no trustees, then by the persons entitled to the real estate subject to any such legacy (*b*). The persons for the time being entitled to any real estate charged with any legacy or annuity given by will might therefore be liable to pay the legacy duty thereon (*c*). But purchasers of lands devised on trust for sale, or otherwise directed by will to be sold, took them free from any charge of legacy duty imposed on any part of the proceeds of sale (*d*). By the Inland Revenue Act, 1888 (*e*), legacy duty shall not be levied and paid in respect of any legacy (*f*) payable, or having effect, or being satisfied out of, or charged or rendered a burden upon, the real or heritable estate of any person dying on or after the 1st of July, 1888, or the rents or profits thereof, which such person shall have had any right or power to charge, burden or affect with the payment of money, or out of or upon any moneys to arise from the sale, mortgage or other disposition of any such real or heritable estate or any part thereof: but succession duty shall be levied and paid in respect of every such legacy as a succession to personal property. Legacy duty is properly payable by the executor before the legacy is paid or satisfied (*g*). But if a legatee be put into possession of the property bequeathed to him, without payment of the legacy duty, he will become liable to the Crown for the duty (*h*). And

Legacies charged on real estate now liable to succession duty.

brances, no duty was payable: but if the proceeds of sale became divisible as personalty, they were liable to legacy duty. See *Re Evans*, 2 C. M. & R. 206; *A.-G.* v. *Mangles*, 5 M. & W. 120; *A.-G.* v. *Simcox*, 1 Ex. 749; *Mules* v. *Jennings*, 8 Ex. 830; 2 Wms. Exors. pt. iii. bk. v. ch. ii. pp. 1628-1630, 7th ed.; Hanson, Death Duties, 562, 6th ed.

(*z*) Stat. 55 Geo. III. c. 184, Sched. pt. iii. These duties were first imposed by stat. 45 Geo. III. c. 28; 2 Wms. Exors. pt. iii. bk. v. p. 1583, 7th ed.

(*a*) *Noel* v. *Henley*, 7 Price, 253.

(*b*) Stat. 45 Geo. III. c. 28, s. 5.

(*c*) *A.-G.* v. *Jackson*, 2 Cr. & Jer. 101; *Stow* v. *Davenport*, 5 B. & Ad. 359.

(*d*) Hanson, Death Duties, 493, 6th ed.

(*e*) Stat. 51 & 52 Vict. c. 8, s. 21 (2).

(*f*) A gift of the residue, after payment of debts or other charges, of the moneys to arise from the sale of real estate directed by will to be sold (above, p. 1191), would be a legacy.

(*g*) Stat. 36 Geo. III. c. 52, ss. 6, 36.

(*h*) Sect. 6.

a purchaser from such a legatee incurs a like liability (*i*). Purchasers from legatees of property subject to legacy duty should therefore require production of the receipt for payment of the duty. But purchasers from executors selling under their general power to dispose of the testator's personalty are not concerned to inquire as to the payment of legacy duty (*j*).

§ 2.—*Of succession duty, account duty and temporary estate duty.*

Succession duty.

Succession duty was made payable by the Succession Duty Act, 1853 (*k*), in respect of the succession on death (*l*) on or after the 19th of May, 1853, to the beneficial interest in any real or personal property (*m*), or the income thereof (*n*), either by virtue of any disposition of the property or on devolution by law (*o*): except in cases where legacy duty was already chargeable in respect of the succession (*p*). It is the disposition or devolution giving rise to the succession (not the succession itself) which creates the liability to succession duty (*q*): but no duty is

(*i*) *Bryan* v. *Mansion,* 3 Jur. N. S. 473; Hanson, Death Duties, 466, 6th ed.

(*j*) See above, p. 1190.

(*k*) Stat. 16 & 17 Vict. c. 51.

(*l*) And on death alone; see *A.-G.* v. *Eyres,* 1909, 1 K. B. 723.

(*m*) In the construction, and for the purposes of this Act, the term *real property* includes leasehold hereditaments, and the term *personal property* does not; sect. 1.

(*n*) Including an annuity charged on property; *Floyer* v. *Bankes,* 3 De G., J. & S. 306; *Re Egmont's Settled Estates,* 1912, 1 Ch. 251.

(*o*) Sects. 2, 10, 54.

(*p*) Sect. 18. But leaseholds, as we have seen, were made chargeable with succession duty, instead of legacy duty.

(*q*) See sect. 2, which is in these words:—"Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived." By sect. 1, the term "succession" shall denote any property chargeable with duty under this Act. By sect. 10, as amended by stat. 10 Edw. VII. c. 8, s. 58 (1), duty is charged on such

payable in respect of any interest in property until some person has become entitled thereunder in possession (*r*). If, therefore,

Rates of succession duty.

"successions" at the following rates:—Where the successor is to the predecessor—

(1) Lineal issue or ancestor, or husband or wife, 1*l.* per cent., subject to the exemptions mentioned below.
(2) Brother or sister, or descendant of a brother or sister, 5*l.* (originally 3*l.*) per cent.
(3) Brother or sister of the father or mother, or descendant of such brother or sister, 10*l.* (originally 5*l.*) per cent.
(4) Brother or sister of the grandfather or grandmother, or descendant of such brother or sister, 10*l.* (originally 6*l.*) per cent.
(5) In any other degree of collateral consanguinity, or a stranger in blood, 10*l.* per cent.

Legacy duty is charged at the same rates; stats. 55 Geo. III. c. 184, Sched. pt. iii.; 10 Edw. VII. c. 8, s. 58. A person chargeable with succession or legacy duty, who shall have been married to any wife or husband of nearer consanguinity than himself or herself to the predecessor, pays the same rate of duty only as such wife or husband would have been chargeable with; stat. 16 & 17 Vict. c. 51, s. 11. As to additional succession duties, see below, at end of this section.

Property subject to charitable or public trusts.

Where property becomes subject to a trust for any charitable or public purposes under any disposition which, if made in favour of an individual, would confer on him a succession, succession duty is payable in respect of such property, upon its becoming subject to such trusts, at the rate of 10*l.* per cent. on the amount or principal value thereof; stat. 16 & 17 Vict. c. 51, s. 16.

Legacy and succession duty as between issue and ancestor and husband and wife.

Legacy or succession duty at the rate of one per cent. as between lineal issue and ancestor was not payable in respect of any property on the value of which either probate or account duty (see below) had been paid under the Inland Revenue Act, 1881 (stat. 44 Vict. c. 12, s. 41), or in respect of property chargeable with estate duty under the Finance Act, 1894 (stat. 57 & 58 Vict. c. 30, ss. 1, 24, and First Schedule; see below), on any death occurring *after* the 1st Aug. 1894. And legacy or succession duty was not payable as between husband and wife on any death occurring *before* the 30th April, 1909; see stats. 55 Geo. III. c. 184, Sched. pt. iii.; 16 & 17 Vict. c. 51, s. 18; 10 Edw. VII. c. 8, s. 58 (2, 4). But by the Finance (1909-10) Act, 1910 (stat. 10 Edw. VII. c. 8, s. 58 (2-4)), legacy and succession duty at the rate of one per cent. were re-imposed as between lineal issue and ancestor and imposed as between husband and wife, subject to exemption in the cases following:—

Exemptions in such cases.

(a) Where the principal value of the property passing on the death of the deceased in respect of which estate duty is payable (other than property in which the deceased never had an interest, and property of which the deceased never was competent to dispose and which on his death passes to persons other than the husband or wife or a lineal ancestor or descendant of the deceased) does not exceed 15,000*l.*, whatever may be the value of the legacy or succession;
(b) Where the amount or value of the legacy or succession together with any other legacies or successions derived by the same person from the testator, intestate or predecessor does not

(*r*) Stat. 16 & 17 Vict. c. 51, s. 20.

lands be settled on one for life with remainder in tail or in fee, a liability to succession duty on the death of the tenant for life is immediately created: but the duty is not payable until his death (*s*). Succession duty, of course, becomes chargeable on a testator's death in respect of the devise of any beneficial interest

Lands settled for life and over.

exceed 1,000*l.*, whatever may be the principal value of such property;

(c) Where the person taking the legacy or succession is the widow or a child under the age of twenty-one years of the testator, intestate or predecessor, and the amount or value of the legacy or succession together with any other legacies or successions derived by the same person from the testator, intestate or predecessor, does not exceed 2,000*l.*, whatever may be the principal value of such property.

By sub-sect. 3, in this section the expression "deceased" means, as to legacy duty, the testator or intestate, and in the case of a succession arising through devolution by law the person on whose death the succession arises, and in the case of a succession arising under a disposition, the person on whose death the *first* succession thereunder arises. And by sub-sect. 4, this section shall take effect as to legacy duty where the testator or intestate dies on or after the 30th April, 1909, and in the case of a succession arising through devolution by law only where the succession arises on or after that date, and in the case of a succession arising under a disposition, only if the *first* succession under the disposition arises on or after that date.

Other exemptions.

Legacy or succession duty is not payable by any member of the royal family; stats. 55 Geo. III. c. 184, Sched. pt. iii.; 16 & 17 Vict. c. 51, s. 18. Succession duty is not payable where the whole succession or successions derived from the same predecessor and passing on any death to any person or persons shall not amount in money or principal value to 100*l.*; stat. 16 & 17 Vict. c. 51, s. 18; see 52 Vict. c. 7, s 10 (2). Legacy duty is not payable where the value of the whole of the testator's or intestate's personal estate does not amount to 100*l.*; stat. 43 & 44 Vict. c. 14, s. 13. And where the net value of the property, in respect of which estate duty is payable on some death (exclusive of property settled otherwise than by the will of the deceased) does not exceed 1,000*l.*, and the fixed duty (payable where the gross value of such property does not exceed 500*l.*) or estate duty has been paid upon the principal value of that estate, the legacy and succession duties shall not be payable under the will or intestacy of the deceased in respect of that estate; stat. 57 & 58 Vict. c. 30, s. 16 (3); see s. 16 (2); stat. 10 Edw. VII. c. 8, s. 61 (2). Also in cases of death on or after the 30th April, 1909, objects of national, scientific, historic or artistic interest are exempted from legacy and succession duty while enjoyed in kind (see *Re Scott*, 1916, 2 Ch. 268; below, p. 1228, n. (*z*); and such duty will only become chargeable when the property is sold and then only in respect of the last death on which the property passed; stat. 10 Edw. VII. c. 8, s. 63, extending 59 & 60 Vict. c. 28, s. 20, which partially exempted such objects from estate duty; see below. The person selling the property, or for whose benefit it is sold, is liable to pay the duty; *Re Scott*, 1916, 2 Ch. 268. As to remission of succession duty in case of death in war and in case of quick successions from the same cause, see stats. 63 Vict. c. 7, s. 14; 4 & 5 Geo. V. c. 76; 5 & 6 Geo. V. c. 89, s. 46; 7 & 8 Geo. V. c. 31, s. 29 (mercantile marine and fishing boats); 8 & 9 Geo. V. c. 15, s. 44; 9 & 10 Geo. V. c. 32, s. 31.

(*s*) See sects. 15, 20; *A.-G.* v. *Chambers*, 1921, 1 K. B. 173, 184.

Devise or descent.

he had in any real or leasehold property, or if a man die intestate, in respect of the devolution of his real estate to the heir or of his leaseholds to the persons entitled under the Statutes of Distribution (*t*).

Joint tenants beneficially entitled.

The duty is also payable on succession to any beneficial interest in any property by reason of the survivorship prevailing in the case of persons jointly entitled (*u*).

Exercise of powers of appointment.

And succession on death under an exercise of a power of appointment, whether general or limited, is as well chargeable with duty as succession under a direct disposition (*x*).

Increase of benefit by extinction of charge, &c.

Succession duty is further payable in respect of the increase of benefit accruing to any person upon the extinction or determination of any charge, estate or interest, to which his property is subject, and which is determinable by the death of any person or at any period ascertainable only by reference to death (*y*); as, for example, where an heir has succeeded, subject to the right of his ancestor's widow to dower and the widow dies, or where one has taken land under a voluntary conveyance *inter vivos,* subject to some estate or interest for life, and the owner of the life interest dies (*z*).

Succession subject to prior charge, &c. not created by the successor.

And if property, in respect of which succession duty is payable, be subject to any prior charge, estate or interest not created by the successor himself, by reason whereof the successor shall not be presently entitled to the full enjoyment or value thereof, the duty in respect of the increased value accruing upon the determination of such charge, estate or interest shall, if not previously paid, compounded for or commuted, be paid at the time of such determination (*a*). This provision applies where

(*t*) 22 & 23 Car. II. c. 10; 1 Jac. II. c. 17, s. 7.

(*u*) Stat. 16 & 17 Vict. c. 51, s. 3.

(*x*) Succession under powers of appointment is provided for partly by sect 2 and partly by sect. 4; see notes thereto in Hanson's Death Duties, 646 *sq.*, 662 *sq.*, 6th ed.; *Re Lovelace's Settlement,* 4 De G. & J. 340. In the case of limited powers, the succession is deemed to be derived from the donor of the power as predecessor; sect. 4. And the general rule is the same in the case of general powers; *Charlton* v. *A.-G.*, 4 App. Cas. 427. But by sect. 4, on the exercise of a general power which has taken effect on a death occurring after the commencement of the Act, the appointor is to be deemed to be entitled to the property appointed as a succession derived from the donor of the power. If in such a case the appointment be made to take effect on a death (as if it be exercised by will or being exercised by deed its operation be suspended until the determination of some life interest), the appointee will take the property as a succession derived from the appointor; *A.-G.* v. *Upton,* L. R. 1 Ex. 224.

(*y*) Sect. 5.

(*z*) See *Harding* v. *Harding,* 2 Giff. 597; Hanson, Death Duties, 668-671, 714, 6th ed.

(*a*) Sect. 20.

one succeeds in possession to land subject to some rentcharge or annuity not created by himself (*b*), or to land let by his predecessor for any term of years at a ground rent or other rent lower than its full annual value (*c*). And to prevent evasion of the Act, where any disposition of property, not being a *bonâ fide* sale and not conferring an interest expectant on death, has been made with the reservation or assurance of, or contract for, any benefit to the grantor or any other person for any term of life or for any other period ascertainable only by reference to death, succession duty is charged on the determination of such benefit in respect of the increase so caused of beneficial interest in the property (*d*); and succession duty is made payable, where any disposition of property has been made to take effect at a period ascertainable only by reference to the date of the death of any person dying on or after the 19th of May, 1853, and also where any disposition of property purports to take effect presently or under such circumstances as not to confer a succession, but by the effect or in consequence of any engagement, secret trust, or arrangement capable of being enforced in a court of law or equity, the beneficial ownership of such property shall not *bonâ fide* pass according to such disposition, but shall in fact devolve to any person on death, or at some period ascertainable only by reference to death (*e*).

Disposition reserving benefit to the grantor for term of life.

Disposition to take effect at a period ascertainable only by reference to death.

Immediate disposition subject to secret arrangement that the beneficial ownership shall not pass till death.

Where any person shall take a succession under a disposition made by himself, then, if at the date of such disposition he shall have been entitled to the property comprised in the succession expectantly on the death of any person dying on or after the 19th of May, 1853, and such person shall have died during the continuance of such disposition, he shall be chargeable with duty on his succession, at the same rate as he would have been chargeable with if no such disposition had been made: but a successor shall not in any other case be chargeable with duty upon a succession taken under a disposition made by himself (*f*). And no person shall be chargeable with duty upon the extinction or determination of any charge, estate, or interest created by himself, unless at the date of the creation thereof he shall have been

Succession under a disposition made by the successor himself.

Extinction of charge, &c., created by the successor himself.

(*b*) See *Re Peyton*, 7 H. & N. 265.
(*c*) *Re Kidd & Gibbons' Contract*, 1893, 1 Ch. 695; *Re Weston & Thomas's Contract*, 1907, 1 Ch. 244; above, p. 383.
(*d*) Sect. 7. See *A.-G.* v. *Johnson*, 1903, 1 K. B. 617.
(*e*) Sect. 8.
(*f*) Sect. 12.

entitled to the property subjected thereto expectantly on the death of some person dying on or after the 19th of May, 1853 (*g*). The case contemplated by the former part of this enactment is illustrated by the resettlement of lands limited to a father for life, with remainder to his son in tail, the estate tail being assured by a disentailing deed, according to the regular practice, to such uses as the father and son shall jointly appoint, and the lands being limited by the resettlement to the father for life, with remainder to the son for life, with remainder to trustees for a term to raise portions for the son's younger children, with remainder to the son's first and other sons successively in tail. In such case, whatever were the date of the resettlement, if the father died on or after the 19th of May, 1853, the son succeeding him as tenant for life became liable to succession duty at the same rate as he would have paid if there had been no resettlement, all uses limited under the resettlement to arise after the father's death being regarded as taking effect out of the original estate tail and therefore as created by a disposition made by the son, whose estate tail was barred (*h*). The son's children therefore become liable to succession duty on his death, in respect of their estates or portions, as on a succession from their father; and if the son's issue should fail, and any collateral relations succeed to any estates or portions under limitations in their favour contained in the resettlement, they will in their turn be liable to succession duty according to the degree of their relationship to the tenant in tail. And if on a resettlement by tenants for life and in tail, the lands are limited to such uses as they shall jointly appoint or as other persons shall appoint, and any of such powers is afterwards exercised, all uses limited under the power to arise after the tenant for life's death are considered, for the purposes of succession duty, to take effect out of the estate tail and to be created by a disposition made by the tenant in tail (*i*).

Under a resettlement of lands by tenants for life and in tail.

All succeeding after the tenant for life take under a disposition by the tenant in tail.

Even though they take under powers created by the resettlement.

Assessment of succession duty on personalty.

Where succession duty is payable on any personal property (other than leaseholds), it is to be assessed and paid in the same manner as if such personal property were a legacy bequeathed

(*g*) Sect. 12, last proviso; as to this, see *Re Peyton*, 7 H. & N. 265.
(*h*) *A.-G.* v. *Sibthorp*, 3 H. & N. 424; *Braybrooke* v. *A.-G.*, 9 H. L. C. 150.
(*i*) *Re Peyton*, 7 H. & N. 265; *A.-G.* v. *Floyer*, 9 H. L. C. 477; *A.-G.* v. *Smythe*, ib. 497; *A.-G.* v. *Cecil*, L. R. 5 Ex. 263; *Charlton* v. *A.-G.*, 4 App. Cas. 427.

by the predecessor to the successor (*j*). If, therefore, the successor becomes absolutely entitled to such property, duty is chargeable on the principal value thereof (*k*); whilst in the case of annuities and successive interests the duty is chargeable as on legacies given in similar form (*l*). By the Succession Duty Act, the duty on a succession to real or leasehold property was made payable on the value (to be calculated according to the tables in the schedule to the Act (*m*)) of an annuity equal to the annual value (*n*) of such property during the successor's life, or for any

On real or leasehold property.

(*j*) Stat. 16 & 17 Vict. c. 51, s. 32.

(*k*) Stat. 36 Geo. III. c. 52, s. 23.

(*l*) Stat. 36 Geo. III. c. 52, ss. 8, 10-12, 14; *Cuddon* v. *Cuddon*, 4 Ch. D. 583; *A.-G.* v. *Aberdare*, 1892, 2 Q. B. 684.

(*m*) Stat. 16 & 17 Vict. c. 51, s. 31.

(*n*) As to the rules for ascertaining such annual value, see sects. 22, 25, 26, 28, 34. Where the annual value, at the time when the successor became entitled in possession, was nothing, it was held that no succession duty was payable; *A.-G.* v. *Sefton*, 11 H. L. C. 257. By the Succession Duty Act, succession duty was made payable in respect of the successor's interest in the net proceeds of sale of any timber, trees or wood (not being coppice or underwood), comprised in the succession *and sold;* sect. 23. But where the successor has sold the land and growing timber together, whether at one price or at separate prices, it has not been the practice of the office to demand duty on the proceeds of the sale of the timber either from vendor or purchaser, or to demand duty if the purchaser subsequently cut the timber; Hanson, Death Duties, 731, 6th ed. By the Finance (1909-10) Act, 1910, stat. 10 Edw. VII. c. 8, s. 61 (5), as varied by F. A. 1911, stat. 1 & 2 Geo. V. c. 48, s. 19 (now repealed), and then by F. A. 1912, stat. 2 & 3 Geo. V. c. 8, s. 9, succession duty payable in respect of woodlands on the death of any person dying on or after the 30th April, 1909, is to be governed by the like rules as are there laid down as to the payment of estate duty in respect of land, whereon timber, trees, or wood are growing (see below, p. 1222, n. (*n*)); except that nothing in this enactment shall affect the rate of succession duty. Under these rules, it appears that the value of the timber, trees, wood, or underwood growing on woodlands is not to be taken into account at the death, for the purpose of determining the value of the woodlands, and succession duty in respect of the timber, &c. is not to become payable thereon, but is to be payable either (1) on the net moneys received from the sale of the timber, &c., when felled or cut, during the period which may elapse until the woodlands, on the death of some other person, again become liable to succession duty, or (2) if at any time the timber, trees or wood are sold, either with or apart from the land on which they are growing, then at that time and in respect of the principal value of the timber, &c., as ascertained at the death, after deducting the amount (if any) of such duty since paid under case (1). Purchasers of woodlands must have regard to this liability, and see that any duty charged thereon in respect of the timber, trees or wood is discharged by the vendor before the completion of the sale. Succession duty is not payable in respect of any advowson or church patronage comprised in any succession, unless the same or some right of presentation or other interest therein be disposed of for money or money's worth by or in concert with the successor, when he is charge-

Timber.

Woodlands.

Advowson.

less period during which he might be entitled; and the duty was required to be paid by eight equal half yearly instalments, commencing at the end of twelve months after the successor should have become entitled to the beneficial enjoyment of the property (*o*). But if the successor should die before all such instalments should have become due, then any instalment not due at his decease should cease to be payable; except in the case of a successor who should have been competent to dispose by will (*p*) of a continuing interest in such property, in which case the instalments unpaid at his death should be a continuing charge on such interest in exoneration of his other property, and should be payable by the owner for the time being of such interest (*q*).

Where the successor is a corporation, &c.

But where any body corporate, company or society should become entitled, as successors, to any real or leasehold property, the duty in respect thereof was required to be assessed on the principal value of such property (*r*). And succession duty was made payable on the principal value of any property becoming subject on the death of any person to a trust for any charitable or public purposes (*s*). By the Finance Act, 1894 (*t*), succession duty is now made payable on the principal value (less the estate duty created by that Act and the expenses of paying the same) of any real or leasehold property (*u*), if the successor is "competent to dispose of the property," that is to say, if he is a person

Property subject to public or charitable trusts.

Where succession duty now chargeable on the principal value of real or leasehold estate.

able with duty on the amount or value of the proceeds of such disposition; stat. 16 & 17 Vict. c. 51, s. 24; see *A.-G.* v. *Peek,* 1913, 2 K. B. 487, 494-6.

(*o*) By stat. 51 & 52 Vict. c. 8, s. 22, the successor has the option of paying half the succession duty by four equal annual instalments, commencing at the end of a year after entering upon enjoyment, and the other half either upon the day of payment of the last of such instalments, or by four further annual instalments with interest at 4*l.* per cent. on the amount remaining unpaid.

(*p*) *A.-G.* v. *Hallett,* 2 H. & N. 368.

(*q*) Stat. 16 & 17 Vict. c. 51, s. 21; see sect. 1, above, p. 1193, n. (*m*).

(*r*) Sect. 27. In such cases the duty was payable by the same instalments as upon a natural person's succession to an estate in fee simple.

(*s*) Sect. 16; above, p. 1193, n. (*q*). This duty is apparently payable immediately and not by instalments; Hanson, Death Duties, 706, 6th ed.

(*t*) Stat. 57 & 58 Vict. c. 30, s. 18; *A.-G.* v. *Anderton,* 1921, 1 K. B. 159.

(*u*) The Act says "real property": but it is presumed that, sect. 18 being an amendment of the Succession Duty Act, 1853, the terms used therein bear the meanings attached to them in that Act (see above, p. 1193, n. (*m*)); although elsewhere in the Finance Act, 1894, the term *real property* is used in its usual and proper legal sense; see sect. 6.

having "such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property, including a tenant in tail, whether in possession or not" (*x*). In such case the succession duty is made "a charge on the property" (*y*), and is payable by the same instalments (to commence twelve months after the successor became entitled in possession) and with the same interest as are authorized by the Act in the case of estate duty on real property (*z*).

Charge of succession duty.

Succession duty is a first charge on the interest of the successor and of all persons claiming in his right in all the real or leasehold (*a*) property in respect whereof the duty is assessed; and is a first charge on the interest of the successor in the personal property (other than leaseholds) in respect whereof the duty is assessed, while the property remains in the ownership or control of the successor, or of any trustee for him or of his guardian or committee, or tutor or curator, or of the husband of any wife who is the successor. Succession duty is also a debt due to the Crown from the successor, having, in the case of real or leasehold property comprised in any succession, priority over all charges and interests created by him: but the duty does not charge or affect any other real or leasehold property of the successor than the property comprised in such succession. Where any settled real or leasehold property comprised in a succession is subject to any power of sale, exchange, or partition, exercisable with the consent of the successor, or by the successor with the consent of another person, he is not disqualified by the charge of duty on his succession from effectually authorizing by his consent the exercise of such power, or exercising any power with proper consent, as the case may be, and in such case the duty is charged substitutively upon the successor's interest in all real or leasehold property acquired in substitution for the property before comprised in the succession, and in the meantime upon his interest also in all moneys arising from the exercise of any such power, and in all investments of such moneys (*b*). Where a rentcharge or an annuity is limited to be payable out of some property "without any deduction" or

Succession duty a Crown debt.

Where settled lands are sold under a power of sale.

Annuity given free from all deductions.

(*x*) Sect. 22 (2*a*).
(*y*) Sect. 18; cf. the language of sect. 42 of the Succession Duty Act.
(*z*) Sect. 18; see sect. 6 (8), stated below.
(*a*) See sect. 1, above, p. 1193, n. (*m*).
(*b*) Sect. 42.

"free from all deductions," any succession duty payable in respect of the rentcharge or annuity must be paid out of the property so charged (*c*).

Persons accountable for succession duty.

The following persons, beside the successor, are personally accountable to the Crown for succession duty, but to the extent only of the property or funds actually received or disposed of by them respectively, that is to say, every trustee, guardian, committee, tutor, or curator, or husband, in whom respectively any property, or the management of any property, subject to such duty, is vested, and every person in whom the same is vested, by alienation or other derivative title at the time of the succession becoming an interest in possession. All such persons are authorized to compound or pay in advance or commute any duty, and retain out of the property subject to any such duty the amount thereof, or to raise such amount, and the expenses incident thereto, at interest on the security of such property, with power to give effectual discharges for the same, and such security shall have priority over any charge or incumbrance created by the successor. In the event of the non-payment of such duty as aforesaid every person so made accountable will be a debtor to the Crown in the amount of the unpaid duty for which he is so accountable (*d*).

Duty on transmitted successions to personalty.

Where the interest of any successor in any personal property (other than leaseholds) shall before he shall have become entitled thereto in possession, have passed by reason of death to any other successor or successors, then one duty only shall be paid in respect of such interest, and shall be due from the successor who shall first become entitled thereto in possession; but such duty shall be at the highest rate which, if every such successor had been subject to duty, would have been payable by any one of them (*e*). This enactment applies only to successions to personalty (*f*); and successions to real or leasehold property are principally regulated by the construction placed on the following provisions of the Act:—Where, at the commencement of the Succession Duty Act, any reversionary property expectant on death was vested, by alienation or other derivative title, in any person other than

Duty payable in respect of interests transferred before the Succession Duty Act.

(*c*) *Floyer* v. *Bankes*, 3 De G., J. & S. 306; *Re Egmont's Settled Estates*, 1912, 1 Ch. 251.

(*d*) Sect. 44; *A.-G.* v. *Chambres*, 1921, 1 K. B. 173, 184.

(*e*) Sect. 14.

(*f*) *Wolverton* v. *A.-G.*, 1898, A. C. 535, 553, 554; Davey, L. A., *Northumberland* v. *A.-G.*, 1905, A. C. 406, 416.

the person originally entitled thereto under any such disposition or devolution as is mentioned in the second section of this Act (*g*), the person in whom such property was so vested was made chargeable with duty in respect thereof as a succession at the same time and at the same rate as the person so originally entitled would have been chargeable with if no such alienation had been made or derivative title created. And where after the commencement of this Act, any succession shall, before the successor shall have become entitled thereto or to the income thereof in possession, have become vested by alienation or by any title not conferring a new succession in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created. And where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place (*h*).

After the Act.

Acceleration of title by surrender, merger, &c.

Great difficulty has been encountered and much difference of opinion expressed in ascertaining the true construction of the Succession Duty Act in respect of the duty payable on estates or interests in remainder or reversion (expectant on a life estate) in real or leasehold property, when they have been transmitted or transferred before they fall into possession. The provisions above quoted apply in case of the transfer of such estates by alienation (which in this context appears to mean alienation *inter vivos* only (*i*)), or by some title not conferring a new succession: but the Act is silent as to the case of the transmission of such estates during the continuance of the life estate by some title which *does* confer a new succession, as by descent or devise; and the true construction of the Act in this respect has never been precisely determined by judicial decision (*j*).

Succession duty on remainders in realty transmitted or transferred before falling into possession.

(*g*) Above, p. 1193, n. (*q*).

(*h*) Sect. 15. This section has no application where estates for life and in fee in remainder limited in default of appointment are extinguished by an appointment to the remainderman; and in such case the former liability to succession duty is removed; *A.-G.* v. *Selborne*, 1902, 1 K. B. 388.

(*i*) Davey, L. A., *Northumberland* v. *A.-G.*, 1905, A. C. 406, 417.

(*j*) See *Re Peyton*, 7 H. & N. 265, 303; *A.-G.* v. *Cecil*, L. R. 5 Ex. 263, 272, 273; *S.-G.* v. *Law Reversionary Interest Socy.*, L. R.

Where the remainder is transmitted solely by title conferring a new succession.

It appears, however, that, if during the lifetime of the tenant for life the remainder has been transmitted, *solely* by some title conferring a new succession and not by alienation nor by any title not conferring a new succession, to some other person than the original remainderman, succession duty is only chargeable at the death of the tenant for life upon the new succession (*k*) acquired by the person then becoming entitled in possession from the person, from whom he immediately derived his title to the remainder, as predecessor (*l*); and the duty which was originally chargeable prospectively on the remainder by reason of the disposition creating it (*m*) ceases to be payable. The reason alleged for the original duty ceasing to be payable in such cases is that succession duty is essentially a tax upon the value of the successor's interest in his succession, *when that interest falls into possession,* and (according to its original principle) is calculated with reference to the probable duration of his own actual enjoyment of that interest (*i.e.*, his prospect of life as from the time when he becomes entitled in possession (*n*)); consequently, no duty is payable (except under the express provisions above quoted (*o*)) in respect of a succession, which has never fallen into possession (*p*). Thus, where land is assured by X. to A. for life with remainder to B., C. and D. successively for their respective lives with remainder to E. in fee, and B., C. and D. all die in A.'s lifetime, no succession duty ever becomes payable in respect of any of their life estates. And as, according to the Succession Duty Act, the same duty exactly was chargeable upon estates in fee as upon estates for life, with the sole exception that on the death of a tenant in fee any instalments not yet due

No duty on life estates never falling into possession.

Transmission of remainders in fee before falling into possession.

8 Ex. 233, 238, 240; *Re Cooper & Allen to Harlech,* 4 Ch. D. 802, 823-827, disapproved of, *Wolverton* v. *A.-G.*, 1898, A. C. 535, 549-555, and overruled, *A.-G.* v. *Northumberland,* 1904, 2 K. B. 762, and *Northumberland* v. *A.-G.*, 1905, A. C. 406.

(*k*) It must be borne in mind that the term "succession" is used in the Succession Duty Act, not in its ordinary sense, but with the special meaning of "any property chargeable with duty under this Act"; above, p. 1193, n. (*q*); *Wolverton* v. *A.-G.*, 1898, A. C. 535, 543, 544, 548, 549; *Northumberland* v. *A.-G.*, 1905, A. C. 406, 416.

(*l*) See Davey, L. A., *Northumberland* v. *A.-G.*, 1905, A. C. 406, 417.

(*m*) See above, pp. 1193-1196.

(*n*) See *Wolverton* v. *A.-G.*, 1898, A. C. 535, 543; Davey, L. A., *Northumberland* v. *A.-G.*, 1905, A. C. 406, 416; above, pp. 1193-1196, 1198, 1200.

(*o*) Sect. 15 of the Act; above, pp. 1202, 1203.

(*p*) Hanson, Succession Duty, 277, 285, 301, 302, 3rd ed.; Hanson, Death Duties, 687, 718, 6th ed.

should remain charged on his interest in the land (*q*), it was considered by the Crown officials that, whenever an estate in fee simple in remainder expectant on a life estate passed by descent or devise alone in the lifetime of the tenant for life, no succession duty would become payable in respect of the deceased remainder-man's own interest in the land (*r*). Thus, suppose that in the case put E. also dies in A.'s lifetime, and his remainder passes by descent or devise to F. Then on A.'s death F. would only pay duty on the new succession which he acquired from E. as his predecessor, and no further duty would be payable in respect of the succession that E. took from X. The same principle is applicable no matter how often the remainder passes by descent or devise alone in the lifetime of the tenant for life. Thus, if E. were a stranger in blood to X., and during A.'s lifetime E.'s remainder passed by descent or devise from E. to F. and from F. to G. and from G. to H., and H. were G.'s wife taking the remainder by devise from him, then on A.'s death H. would only be chargeable with succession duty on the succession, which she derived from H. as her predecessor; and as H. was her husband, she would, if A. died before the 30th of April, 1909, have been exempted from paying any succession duty at all; and if A. died on or after that day, she would be charged with succession duty at the rate of one per cent. only, subject to exemption in the cases provided for by the Finance (1909-10) Act, 1910 (*s*). It is apparently considered by the Crown officials (*t*) that no change was made in any of the above respects by the provisions of the Finance Act, 1894 (*u*), enacting that the value for the purpose of succession duty of a succession to real property, where the successor is competent to dispose of the property, shall be the principal value of the property, and making the duty "a charge on the property." And it may be urged that the Finance Act, 1894, only altered *the mode of computing* the value of the successor's interest, leaving the value of that interest and the successor's actual enjoyment of it the essential subject of taxation as before (*v*); and further, that

(*q*) Above, pp. 1199, 1200.
(*r*) See Hanson, Succession Duty, 277, 285, 301, 302, 3rd ed.
(*s*) See above, p. 1193, n. (*q*).
(*t*) The author was concerned in a case, from which it appeared that this is the official view.
(*u*) Stat. 57 & 58 Vict. c. 30, s. 18; above, pp. 1200, 1201.
(*v*) Above, pp. 1200, 1201.

the duty still remains payable by instalments commencing only at the end of twelve months after the successor has become entitled in possession (*x*).

Title conferring a new succession.

A.-G. v. *Cecil.*

We may note that descent and devise are not the only means by which reversionary property may pass by some title conferring a new succession. Thus where a tenant for life and remainderman in tail disentailed their lands and created a joint power of appointment, which they exercised by appointing a sum of 20,000*l.* to be raised out of lands on the death of the tenant for life and paid to A., it was held that A. took the money by title conferring a new succession from the remainderman, as his predecessor, and was chargeable on such death with succession duty accordingly: but the Crown claimed no further succession duty in respect thereof (*y*).

Where a remainder is transferred by alienation or by title not conferring a new succession.

But where a remainder is transferred during the lifetime of the tenant for life either by alienation or by some title *not* conferring a new succession, there the original liability to succession duty, which was created by the disposition limiting the estates for life and in remainder, is not discharged, but under the above quoted provisions of the Act (*z*) becomes indefeasibly attached to the remainder. And the liability so created will continue to be attached to the remainder, notwithstanding that it also devolve during the lifetime of the tenant for life by some title conferring a new succession. For example, let X. have assured land to A. for his life, with remainder to B. in fee. If B. sell his remainder in A.'s lifetime to C., C. takes subject to the liability to duty created by X.'s disposition and must satisfy this on A.'s death, the rate of duty being determined by the relationship between X. and B. (*a*). And if C. die in A.'s lifetime and the remainder which he bought be transmitted by descent or devise from him to D., D. takes subject to the original liability to succession duty as well as to the liability created by the devolution or disposition of a new succession.

(*x*) See above, p. 1200; Hanson, Death Duties, 687, 697-701, 718, 719, 6th ed.

(*y*) *A.-G.* v. *Cecil*, L. R. 5 Ex. 263. It was considered that the limitation of this charge was not an alienation *pro tanto* of the remainderman's succession, but was the creation of a new and distinct interest out of it. Cf. *Wolverton* v. *A.-G.*, 1898, A. C. 535, 556.

(*z*) Sect. 15; above, pp. 1202, 1203.

(*a*) *Northumberland* v. *A.-G.*, 1905, A. C. 406, 414, 417, 418.

from C. to him; and on A.'s death D. must satisfy both of these liabilities (*b*). The result is the same if A. and B. together sell the whole fee to C., either by direct grant of their estates or by means of a joint power of appointment created by them, or if A. surrender his life estate to B. and afterwards B. sell the entire fee to C. In each case C. takes subject to the original liability to succession duty, which is not required to be discharged until the death of A., but must then inevitably be satisfied. And where in A.'s lifetime C. has bought the whole fee from A. and B. in any of the above mentioned ways and died, the property then passing from him by descent or devise to D., D. must pay succession duty at C.'s death (the estate so taken by him being in possession) on the succession, which he has acquired from C., and must again pay succession duty at A.'s death on the succession taken by B. from X. (*c*). And it appears that, no matter how often the property may be transmitted from C. by descent or devise in A.'s lifetime, succession duty will be payable by every successor on the succession, which he has so derived from his own immediate predecessor, and again on A.'s death in respect of the original succession acquired by B. (*d*). It has been decided that *alienation* in the above quoted provisions of the Succession Duty Act (*e*) includes voluntary or gratuitous alienation *inter vivos* (*f*), as well as alienation for value, and also extends to alienation conferring a new succession (*g*). But alienation does not here include mortgage or charge; though alienation will take place if the mortgagee foreclose, or otherwise become absolute owner of the mortgaged property, or sell it (*h*). A "succession" may become vested in another person "by title not conferring a new succession" in case of the successor's bankruptcy (*i*).

A.-G. v. *Northumberland.*

Voluntary alienation.

Let us now consider what succession duty is chargeable when during the lifetime of the tenant for life a remainder is first

Where a remainder is first trans-

(*b*) See *Northumberland* v. *A.-G.*, 1905, A. C. 406, 409, 414 *sq.*
(*c*) *A.-G.* v. *Northumberland,* 1903, 2 K. B. 71, affirmed, 1904, 1 K. B. 762; *Northumberland* v. *A.-G.*, 1905, A. C. 406, overruling *Re Cooper & Allen to Harlech,* 4 Ch. D. 802.
(*d*) See *S. C.*
(*e*) Sect. 15; above, pp. 1202, 1203.
(*f*) See above, p. 1203.
(*g*) *Wolverton* v. *A.-G.*, 1898, A. C. 535.
(*h*) See Hanson, Succession Duty, 283, 3rd ed.; Hanson, Death Duties, 696, 697, 6th ed.
(*i*) See above, p. 1204; *Wolverton* v. *A.-G.*, 1898, A. C. 535, 555; *Northumberland* v. *A.-G.*, 1905, A. C. 406, 414, 417.

mitted by title conferring a new succession and then alienated.

transmitted solely by some title conferring a new succession, and is afterwards alienated or transferred by some title not conferring a new succession. Suppose in the example given above (*k*) that, in the lifetime of A., B. the original remainderman dies, without having sold his remainder and leaving D. his heir or devisee thereof, and D. afterwards sells the remainder to E. What succession duty will be payable on A.'s death? It has been suggested that E. must pay duty on D.'s succession acquired from B. and also on the succession which B. took from X. (*l*), on the alleged ground that, whenever alienation forms one link in the chain of devolution of the original remainderman's title to the person, who ultimately becomes entitled in possession, the duty originally chargeable on the first remainderman's succession will become payable. But this seems to be a most extraordinary result. When B. died, the original liability to duty of his succession from X. was, according to the theory of the Crown officials, discharged, because B.'s own beneficial interest never fell into possession; and there was substituted in its place a liability of D. to pay duty at A.'s death on the new succession acquired by D. from B. (*m*). If, then, in A.'s lifetime D. sell his remainder to E., is it not D.'s "succession" which becomes vested by alienation in E.? And if duty is to be paid in respect thereof "at the same rate and time as if no such alienation had been made" (*n*), must not the duty be the same as would have been payable if D. had not sold to E., *i.e.*, what D. himself would have had to pay on A.'s death if he had not sold his remainder? If B.'s "succession" taken from X., as a piece of property taxable with succession duty, became extinct when he died before becoming entitled in possession, it seems very strange if it can afterwards be revived by an alienation by D. of the "new succession," which he took from B. The writer is not aware of any decision on this question; and he respectfully submits that the judgments given in *Lord Wolverton's* and the *Duke of Northumberland's* cases (*o*) show that the principle of the Succession Duty Act is that the owner of a "succession," which is to come into possession on a future death

(*k*) Above, p. 1206.
(*l*) Hanson, Death Duties, 699, 700, 6th ed.
(*m*) Above, p. 1205.
(*n*) See above, p. 1203.
(*o*) *Wolverton* v. *A.-G.*, 1896, A. C. 535; *Northumberland* v. *A.-G.*, 1905, A. C. 406, 409, 413, 415, 418.

and is chargeable prospectively with succession duty payable on that death, shall not be enabled by any alienation made or act done by him *inter vivos* to defeat *such prospective liability to duty;* and that they do not warrant the conclusion that such alienation will subject the property disposed of, not only to that prospective liability, but also to an additional liability, from which it would have been exempt if no such alienation had been made. To return to the example given, suppose that D., the heir or devisee of the original remainderman, instead of selling the remainder, becomes bankrupt. That would have the same effect, with respect to the liability to succession duty, as if D. had alienated the remainder (*p*). But can it really be the law that D.'s trustee in bankruptcy would take his remainder, not only subject to the same liability as affected it before in D.'s hands to pay a single duty on D.'s succession from B., but burdened with the liability to pay a double duty? No doubt all things are possible in the construction of the Succession Duty Act: but it is thought that the Courts would endeavour to avoid such a result as this.

Sale of a remainder after the remainder-man's death under powers paramount to any new successor's title.

The case of the sale of an estate in remainder expectant on a life estate by one who has acquired it by descent or devise from the original remainderman, and has so taken a new succession from him, must be distinguished from that of the sale of the remainder after the original remainderman's death, under some power, which is paramount to the title of any person acquiring the beneficial ownership of the remainder as a new succession from him. Thus, if, after the original remainderman's death, the remainder be sold in order to pay his funeral, testamentary or administration expenses or debts, either under a trust or power for that purpose contained in his will, or under an order of the Court, or under the powers given to his legal personal representatives by the Land Transfer Act, 1897 (*q*), the official view appears to be that in all these cases his own original "succession" (and not any new succession derived from him as predecessor) is sold; so that the purchaser acquiring it through alienation will take subject to the original liability to pay succession duty at the death of the tenant for life (*r*).

(*p*) See above, pp. 1203, 1206, 1207.
(*q*) Above, pp. 205-212.
(*r*) Hanson, Succession Duty, 283, 3rd ed.; Hanson, Death Duties, 697, 6th ed.

In this case it is obvious that, if the duty on the original succession were not payable, the Crown would receive no such duty at all; for neither legacy nor succession duty would be payable in respect of the proceeds of sale. It also seems to be the official view that duty on the original succession remains payable where the remainder is sold under a direction contained in the remainderman's will to raise by sale money to be distributed among beneficiaries as personalty (*s*). But this conclusion appears to be questionable; for in this event a new succession has in effect been created, the beneficiaries being chargeable, formerly with legacy duty, and now with succession duty, in respect of their interests in the proceeds of sale as upon a succession derived from the testator as predecessor (*t*). So that the purchaser takes, if not an actual new succession *in specie*, at least property which comes to him by a title in which the devise conferring a new succession on the beneficiaries is antecedent and is in fact a condition precedent to the alienation to him. The testator by such a devise is exercising the power of testamentary disposition incident to his own beneficial ownership; he is disposing by will of what remains to him after all his liabilities have been satisfied. This case, therefore, seems in principle to be different from that of an express or implied direction to sell for payment of debts, these being liabilities of the testator in his lifetime. Funeral and testamentary expenses seem to come into the same class because they are liabilities of the testator's estate, which are paramount even to his debts, and *à fortiori* to any exercise by him of the power of testamentary disposition in favour of beneficiaries. If the official view be correct, the Crown obtains double succession duty in case of the devise of a remainder on trust for sale and to divide the proceeds amongst beneficiaries, but a single duty only where the remainder is devised for the beneficiaries' enjoyment *in specie* (*u*). Purchasers of remainders must of course have regard to the official view. The writer is not aware of any judicial decision or *dictum* on the subjects discussed in this paragraph.

Real or leasehold property settled on trust for sale.

The interest of any successor in moneys to arise from the sale of real or leasehold property under any trust for sale thereof, if not chargeable with legacy duty (*x*), is chargeable with succes-

(*s*) See previous note.

(*t*) See above, pp. 1191-1193.

(*u*) See above, pp. 1203 *sq.*

(*x*) Above, pp. 1191, 1192.

sion duty as personalty; unless the moneys are subject to any trust for the re-investment thereof in the purchase of other real or leasehold property to which the successor would not be absolutely entitled, when they are chargeable with succession duty as realty (*y*). The interest of any successor in personal property (other than leaseholds), which is subject to any trusts for the investment thereof in the purchase of real or leasehold property, so far as the same is not chargeable with legacy duty, is chargeable with succession duty as personalty, if the successor would be absolutely entitled to the purchased property: but if not, then as realty (*z*).

Personalty subject to a trust for investment in real or leasehold property.

The Commissioners of Inland Revenue are authorized to compound any succession duty payable (*a*), to receive the same in advance at a discount (*b*), and at their discretion, on application made by any person who is entitled to a succession in expectancy or would be accountable for the duty if the same were then in possession, to commute the duty presumptively payable in respect of such succession for a certain sum to be presently paid (*c*). And by the Finance (1909-10) Act, 1910 (*d*), the Commissioners may, if they think fit, accept in satisfaction of the succession duty payable in respect of any real or leasehold property such part of the property as may be agreed on between them and the person liable to pay the duty.

Power to compound or commute succession duty.

To accept land in satisfaction of the duty.

The Crown not being bound by the Statutes of Limitations as to charges on lands (*e*), its lien on any lands for succession duty was not formerly liable to be barred by lapse of time. But

Charge of succession duty formerly not barred by lapse of time.

(*y*) Stat. 16 & 17 Vict. c. 51, s. 29. In the latter case, the successor's interest is considered to be of the value of an annuity payable during the period for which he is entitled and equal in amount to the income of the trust property in its actual state of investment at the time when the successor becomes entitled in possession.

(*z*) Sect. 30. In the latter case the successor's interest is considered as equal to the value of an annuity payable during the period for which he is entitled and equal in amount to the income of the trust property in its actual state of investment at the time when the successor becomes entitled in possession.

(*a*) Sect. 39.

(*b*) Sect. 40.

(*c*) Sect. 41; stat. 43 Vict. c. 14, s. 11.

(*d*) Stat. 10 Edw. VII. c. 8, s. 56 (1). By sect. 56 (2), no stamp duty is payable on any conveyance or transfer of land to the Commissioners under this section.

(*e*) Stats. 3 & 4 Will. IV. c. 27, s. 40; 37 & 38 Vict. c. 57, s. 8; Wms. Real Prop. 643, 646, 23rd ed.

May now be barred as against purchasers or mortgagees.

it is enacted by the Inland Revenue Act, 1889 (*f*), that, notwithstanding the 42nd section of the Succession Duty Act, 1853 (*g*), or any other provision contained in that Act, real property (*h*), or any estate or interest therein, shall not, as against a purchaser for valuable consideration, or a mortgagee, remain charged with or liable to payment of any sum for succession duty or temporary estate duty (*i*) after the expiration of six years from the date of notice to the Commissioners of Inland Revenue of the fact that the successor, or any person in his right or on his behalf, has become entitled in possession to his succession or to the receipt of the income and profits thereof, or from the date of the first payment by such successor or person of any instalment or part of the duty, in case the successor shall not have availed himself of the option given to him by the Inland Revenue Act, 1888 (*k*), or after two years from the time for the payment by such successor of the last instalment or part of the duty, if he has availed himself of such option; or, in the absence of any such notice or payment, after the expiration of twelve years from the happening of the event (whether before or after the passing of the Inland Revenue Act, 1889) which gave rise to an immediate claim to such duty, or if such period of twelve years expires within six years from the date of the passing of this Act, then after the expiration of six years from the last-mentioned date (*l*).

(*f*) Stat. 52 Vict. c. 7, s. 12 (1).

(*g*) Above, p. 1201.

(*h*) As this enactment is in effect an amendment of sect. 42 of the Succession Duty Act, 1853, it seems that the term "real property" must here include leaseholds; see above, pp. 1193, n. (*m*), 1200 n. (*u*).

(*i*) See below.

(*k*) Above, p. 1200, n. (*o*).

(*l*) By sect. 12 (2), the duty (if any) unpaid at the expiration of such period of six years or of twelve years or six years, as the case may be, shall be payable and paid by the successor or the persons mentioned as accountable in sect. 44 of the Succession Duty Act, other than the purchaser or mortgagee, and shall become charged substitutively upon any other estate or interest comprised in the succession of the successor remaining vested in him, or in any person in his right or on his behalf other than the purchaser or mortgagee, and in case of a mortgage upon the equity of redemption. By sect. 12 (2), the above enactment is not to lessen or affect any liability of any successor or accountable person, other than the purchaser or mortgagee, to payment of duty, whether out of money received on any sale or mortgage, or otherwise: but a purchaser or mortgagee shall not, for the purpose of obtaining the exemption conferred by the above enactment, be bound to see that the duty is discharged out of the money or other consideration paid or given as the consideration for the sale or mortgage.

Succession duty being made a charge, as above mentioned (*m*), on the successor's interest in any real or leasehold property, the conveyancer advising on title should of course call for the production of the receipts for succession duty in every case in which it appears from the abstract that such duty became payable. In the cases of succession to land upon death and intestacy, or under a devise giving immediate possession on the testator's death, the liability to succession duty is a comparatively simple matter; as the duty then becomes payable and charged on the successor's interest directly after the death. But it must not be forgotten that, where the successor has not paid the duty on the full annual value of his succession, owing to its being subject to some prior charge, estate or interest not created by himself, the further duty to be paid on the determination of such charge, estate or interest remains as a prospective liability charged on the successor's interest (*n*). And if the successor sell his interest before the further duty has become payable, the purchaser will be entitled to require this liability to be commuted (*o*). Also on the purchase of woodlands, an undischarged liability may now exist for succession duty on the value of the growing timber, trees or wood (*p*). Where lands are settled on one for life and others in remainder, the conveyancer must always have regard, not only to the duty, if any, payable when the tenant for life came into possession, but also to that which will become payable on his death or on the death of any of the remaindermen entitled for life or in tail. As we have seen (*q*), the disposition creating the settlement gives rise to a liability to succession duty in respect of the estates limited by the settlement in remainder expectant on a death; and this liability at once attaches on such estates, as against all persons who may subsequently take them: although the liability is not required to be satisfied until the estate affected by it falls into possession. Thus the purchaser of an estate in remainder or reversion expectant on death takes subject to the liability to pay the succession duty when the estate shall fall into possession; and he cannot require the vendor, in the absence of special stipulation, to pro-

Conveyancer's duty as regards succession duty.

Descent or devise.

Woodlands.

Where lands are settled for successive interests.

Liability to duty created by the disposition.

Sale of a remainder or reversion.

(*m*) Above, p. 1201.

(*n*) See above, pp. 1196, 1201.

(*o*) *Re Kidd & Gibbons' Contract*, 1893, 1 Ch. 695; *Re Weston & Thomas's Contract*, 1907, 1 Ch. 244; above, p. 400.

(*p*) Above, p. 1199, n. (*n*).

(*q*) Above, pp. 1193-1195, 1203-1210.

Sale by tenant for life and remainder-man.

cure this liability to be discharged, the tax being regarded as an incident of the estate, not as an incumbrance (*r*). So when lands are sold by a tenant for life and remainderman in fee together, each conveying his own estate, the purchaser takes subject to the liability to succession duty on the death of the tenant for life, the time for payment of such duty not being accelerated by the merger of the life estate; and this is also the case where a tenant for life and remainderman in fee have created a joint power of appointment by grant of their estates and then conveyed to a purchaser in exercise of such power (*s*). In these cases, however, if the vendors simply contracted to sell an estate in fee without showing the liability to succession duty, the purchaser could require them to procure the duty to be commuted; and it has generally been allowed that the purchaser has the same right where the vendors contract together to sell him an estate in fee simple in possession, though he have notice that they are entitled as tenant for life and remainderman (*t*). But if they contracted as tenant for life and remainderman, each selling his own interest separately, then it seems that the purchaser would have to bear the charge of succession duty, in the absence of stipulation to the contrary (*u*). On the purchase (either alone or in conjunction with the particular estate) of a remainder or reversion, which is no longer vested in its original owner, regard must be had to the question, whether the property will be charged with one succession duty only on the determination of the particular estate or is affected with some further liability to duty, and to the law discussed above (*x*).

Sale of settled lands under a power of sale.

We have seen (*y*) that, where settled lands comprised in a succession are subject to a power of sale, which is exercised, any succession duty charged on the lands is to be charged substitutively on the successor's interest in all lands acquired with and interim investments of the purchase money. This provision seems to point only to such powers of sale as were usually con-

(*r*) Above, p. 392, and n. (*b*).

(*s*) See above, p. 1206; *A.-G.* v. *Northumberland,* 1903, 2 K. B. 71, affirmed, 1904, 1 K. B. 762, and 1905, A. C. 406.

(*t*) See *Re Kidd & Gibbons' Contract,* 1893, 1 Ch. 695, 698; Davidson, Prec. Conv. vol. ii. pt. i. pp. 253, n., 313, n., 4th ed.; Dart, V. & P. 277, 593, 5th ed.; 317, 667, 6th ed.; 1233, 1234, 7th ed.; Davidson's Concise Precedents, 185, n., 19th ed.

(*u*) See above, p. 392, and n. (*b*), and previous note.

(*x*) Pp. 1202-1209.

(*y*) Above, p. 1201.

tained in settlements before the Settled Land Act, 1882, took effect (*z*), where the purchase money is required to be laid out in buying other lands to be settled to the same uses. On the exercise of such a power, the purchaser takes the lands free from any succession duty then actually payable and charged on any estate defeated by the exercise of the power, as where the lands are sold before payment of all the instalments of the duty payable on the succession of a tenant for life in possession. The purchaser also takes the lands free from all liability to succession duty on the death of the tenant for life or any remainderman entitled under the settlement; because, by the exercise of such a power, all the estates limited by the settlement in default of appointment under the power of sale are utterly extinguished, so that nothing is left, to be charged with duty, of any estate so limited in remainder (*a*). It was held in one case, where lands subject to a jointure rentcharge were settled with a power of sale, so that the exercise of the power could not affect the jointure, and the lands were sold under the power, that the purchaser would take free from all claims for succession duty (*b*). This decision was pronounced by a late eminent conveyancer to be manifestly wrong (*c*); and it is obvious that there was a liability to succession duty, in respect of the cesser of the jointure (*d*), and that this liability was capable of attaching not only to the estates defeated but also to those estates limited by the exercise of the power. Still, the liability did affect the estates limited by the settlement in default of appointment under the power of sale, although the duty was rather chargeable than actually charged thereon; and it is not altogether surprising that the judges considered that, according to the spirit of the Act, the duty in question was to be charged on the investments of the purchase money. When settled lands are sold under the powers conferred by the Settled Estates Act, 1877, the estates limited by the settlement are defeated in like manner as if the lands had been sold under an express power of sale (*e*); and it has been

Sale under the Settled Estates Act.

(*z*) Wms. Real Prop. 427, 428, 23rd ed.

(*a*) *Re Warner's Settled Estates*, 17 Ch. D. 711, 713; and see *Ray* v. *Pung*, 5 B. & A. 561; *Doe* d. *Wigan* v. *Jones*, 10 B. & C. 459; *Skeeles* v. *Shearly*, 3 My. & Cr. 112; Sug. Pow. 478-481, 8th ed.; *A.-G.* v. *Selborne*, 1902, 1 K. B. 388.

(*b*) *Dugdale* v. *Meadows*, L. R. 9 Eq. 212; 6 Ch. 501.

(*c*) Davidson, Prec. Conv. vol. ii. pt. i. p. 313, 4th ed.

(*d*) See above, p. 1196.

(*e*) Stat. 40 & 41 Vict. c. 18, s. 22.

held that prospective claims of succession duty are therefore charged substitutively on the investments of the purchase money to the same extent as on a sale under an express power (*f*). Sales made under the powers given by the Settled Land Act, 1882 (*g*), have the like effect of defeating the estates limited by the settlement; and the purchaser of settled land from a tenant for life selling under this Act takes it free from the prospective liability to succession duty on the death of the tenant for life, which is shifted on to the remainderman's interest in the proceeds of sale: but the official view is that such sales do not shift any charge that may be existing on the life-tenant's own interest for succession duty in respect of his own succession to the property (*h*).

Sale under the Settled Land Act.

Trust for sale.

Where lands have been assured to trustees upon trust for sale, whether by deed or will, any succession duty, which may become payable by virtue of the disposition, will be chargeable on the successor's beneficial interests in the proceeds of sale (*i*), not on the lands assured. Any person purchasing lands from such trustees will therefore take them free from any charge of succession duty imposed on the purchase money, and appears to be under no obligation to see that any such duty is paid. If, however, the persons beneficially entitled under a trust for sale of lands should elect to take the lands *in specie*, the succession duty will then become charged or chargeable on their interests in the lands; and, as no person can by his own election diminish his liability to the Crown for duty, it appears that in such cases, wherever the successor would have been liable to succession duty on the principal value of his interest in the proceeds of sale, his interest in the lands elected to be taken *in specie* will be chargeable with no less an amount of duty (*j*).

Election to take *in specie* lands assured on trust for sale.

Effect of statutory bar against Crown.

Here we may observe that the discharge from succession duty given in favour of a purchaser or mortgagee by the Inland

(*f*) *Re Warner's Settled Estates*, 17 Ch. D. 711.
(*g*) See stat. 45 & 46 Vict. c. 38, ss. 3, 20.
(*h*) See 35 Sol. J. 273, 274, 359, 360; 1 Key & Elph. Prec. Conv. 597, n. (*e*), 10th ed.
(*i*) Above, pp. 1201, 1210, 1211.
(*j*) See *A.-G.* v. *Holford*, 1 Price, 426; above, p. 1210. The question of election does not for this purpose appear to be affected by Conveyancing Act, 1911, s. 10 (3), which preserves the trust for sale so far as regards the protection of a purchaser until conveyance to or under the direction of the beneficiaries; above, p. 245.

Revenue Act, 1889 (*k*), at the end of twelve years after the duty became payable, is only accorded in the absence of notice to the Commissioners or payment of part of the duty. This raises the question whether, if such notice were received or payment made towards the end or even after the expiration of the period of twelve years, the time for extinguishing the charge would not start from the date of such notice or payment (*k*). It does not appear therefore that a conveyancer advising a purchaser can safely omit to inquire as to the payment of all succession duty, which became payable more than twelve years before the contract for sale. The proper course seems to be to call for the production of the receipts for such duty in the usual way. And it is apprehended that the Act in question does not exonerate the vendor from the obligation of producing such receipts; he must prove the discharge of an incumbrance by payment, if he can. If he cannot, he may then allege that the defect is cured by a Statute of Limitations; and it will be for the purchaser's advisers to consider whether their client is protected by the Act (*l*).

Payment of succession duty ought to be stated on the abstract.

It has been held in Ireland that, as the discharge of any succession duty which has become charged on the land sold is a part of the vendor's title, the fact of payment of such duty ought to be stated in the abstract; and, further, that the payment of the duty ought to be proved by the vendor at his own

(*k*) Stat. 52 Vict. c. 7, s. 12 (1); above, p. 1212.

(*l*) A purchaser requisitioning for proof of payment of succession duty on a death, which occurred more than twelve years before the sale, is usually met with the contention that sect. 12 of the Inland Revenue Act, 1889, renders such proof unnecessary. For the reasons given above, however, it is submitted that this is not so. And where the receipts for the duty are in the vendor's own possession, there is no good ground for his refusing to produce them. Where the vendor is obstinate in refusing to withdraw the above contention and the purchaser thinks it injudicious to rely on the lapse of time alone, the simplest course is for the purchaser's solicitor to write himself to the Controller of Inland Revenue, inquiring if any succession duty, which became charged on the property sold on the death in question, remains unpaid. It has happened within the author's experience that the reply to such an inquiry has been that such duty is still outstanding and unpaid. It seems that, where a vendor sets up the statute and alleges the expiration of the term of six or two years therein mentioned, he ought in strictness to prove the fact of such notice or payment as is specified in the Act; and that, where he sets up the term of twelve years, he ought to prove the absence of such notice or payment; see previous note. But in practice it has not been usual for a purchaser proposing to rely on the twelve years' period to require such proof.

expense (*m*). As regards the statement in the abstract of payment of the duty, and the vendor's obligation to prove the payment, this decision appears (if we may be allowed to say so) to be entirely in accordance with the principles of the English law. For the fact of payment-off of any charge affecting the land sold is certainly a matter which ought properly to be abstracted (*n*); and the vendor's duty of proving such payment is unquestionable (*o*). But it is a question whether this decision will be followed in this country as regards the *expense* of proving payment of such succession duty. For it is respectfully submitted that, if the receipts be not in the vendor's possession, then under the Conveyancing Act, 1881, the expense of producing them falls upon the purchaser (*p*).

Account duty. Under the Inland Revenue Act, 1881 (*q*) as amended by the Inland Revenue Act, 1889 (*r*), certain voluntary dispositions of personal property, including leaseholds and the proceeds of sale of real estate settled on trust for sale (*s*), gave rise, on the death of the disposing party, to a liability to payment of stamp duty at the same rate as probate duty on the value of the property disposed of. These dispositions were (1) *Donationes mortis causâ* made by persons dying on or after the 1st of June, 1881 (*t*); (2) any immediate gift, at law or in equity, not made *bonâ fide* twelve months (*u*) before the donor's death; (3) any

(*m*) *Re Conlon and Faulkener's contract,* 1916, 1 I. R. 241.

(*n*) See above, pp. 32, 39, 98. But in England it has not hitherto been the general practice to state in the abstract the payment of succession duty, though sometimes this is done.

(*o*) See above, pp. 32, 39, 120, **124**, 125.

(*p*) Stat. 44 & 45 Vict. c. 41, s. 3 (6); above, pp. 33, 43, 124, 125. In *Re Conlon and Faulkener's contract,* 1916, 1 I. R. 241, 247, the vendor was held bound to procure proof of payment at his own cost on the ground that "it is idle to say there was any expense involved; all that was required was writing a letter to the Inland Revenue authorities." It is respectfully submitted, however, that, though the expense of such a letter might be trifling, the purchaser would nevertheless be bound under the above enactment to pay it.

(*q*) Stat. 44 Vict. c. 12, s. 38, passed 3rd June, 1881.

(*r*) Stat. 52 Vict. c. 7, s. 11, passed 31st May, 1889.

(*s*) *A.-G.* v. *Dodd,* 1894, 2 Q. B. 150.

(*t*) As to the estate duty now payable in respect of a *donatio mortis causâ,* see below, p. 1224; *Re Hudson,* 1911, 1 Ch. 206.

(*u*) Twelve was substituted for three by the Act of 1889. See *A.-G.* v. *Jacobs Smith,* 1895, 2 Q. B. 341. But now, in the application of these enactments to the payment of estate duty under sect. 2 (1) (c), (3) of the Finance Act, 1894, stat. 57 & 58 Vict. c. 30 (see below, p. 1225), and in the case of a person dying on or after the 30th April, 1909, the period of three years is to be substituted for

gift, whenever made, of any property, of which *bonâ fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforth retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise (*x*); (4) any voluntary disposition (*y*) vesting any property in the disposer jointly with any other person so that the beneficial interest therein, or in some part thereof, passes or accrues by survivorship on the disposer's death to such other person; (5) any voluntary settlement made by deed or other instrument not taking effect as a will, whereby an interest for life or determinable by death in the property settled is expressly or impliedly reserved to the settlor, or whereby the settlor has reserved to himself the right, by the exercise of any power, to restore to himself, or to retain the absolute interest in such property (*z*); (6) any declaration of trust in favour of a volunteer made, with like reservations in the settlor's favour, in writing or otherwise, notwithstanding in the case of a deed or other instrument, that the same was made for valuable consideration as between the settlor and some person other than the volunteer (*a*); and (7) any policy of assurance effected on a donor's life, and kept up, either wholly or partly, for the benefit of a donee, whether nominee or assignee (*b*). The duty so

that of twelve months before the death; except that this amendment is not to apply to any gift *inter vivos* made before the 30th April, 1908, or made for public or charitable purposes; stat. 10 Edw. VII. c. 8, s. 59 (1).

(*x*) No. (3) was added by the Act of 1889. See *A.-G.* v. *Worrall*, 1895, 1 Q. B. 99. By stat. 10 Edw. VII. c. 8, s. 59 (3), in the application of this provision to the payment of estate duty under the Finance Act, 1894 (see below, p. 1225), the property shall not be deemed to pass on the death of the deceased if subsequently, by means of the surrender of the benefit reserved or otherwise, it is enjoyed to the entire exclusion of the deceased and of any benefit to him by contract or otherwise for three years preceding the death of the deceased.

(*y*) Including, by the Act of 1889, "any purchase or investment effected by the person who was absolutely entitled to the property, either by himself alone, or in concert or by arrangement with any other person." See *A.-G.* v. *Ellis*, 1895, 2 Q. B. 466.

(*z*) See *Crossman* v. *R.*, 18 Q. B. D. 256; *A.-G.* v. *Heywood*, 19 Q. B. D. 326; *Re Croft*, 1892, 1 Ch. 652.

(*a*) The ordinary trusts in a marriage settlement of the wife's property for her next of kin, in default of children, fall under this description: *A.-G.* v. *Theobald*, 24 Q. B. D. 557. See also *A.-G.* v. *Chapman*, 1891, 2 Q. B. 526; *A.-G.* v. *Gosling*, 1892, 1 Q. B. 545; *A.-G.* v. *Jacobs Smith*, 1895, 2 Q. B. 341.

(*b*) Nos. (6) and (7) were added by the Act of 1889. No account duty was payable if the donee kept up the policy; *Lord Advocate* v. *Fleming*, 1897, A. C. 145.

charged was commonly called account duty; because every person, who as beneficiary, trustee *or otherwise* acquired possession or assumed the management of any personal property included in any of the above-mentioned voluntary dispositions, was bound to deliver to the Commissioners of Inland Revenue an account of such property, duly stamped according to the amount of duty payable, within six calendar months after the death of the disposing party; on pain, in case of default, of being liable to pay double the duty as a debt to the Crown recoverable by any of the means in force for the recovery of probate, legacy or succession duties (*c*). Account duty was not otherwise charged on the property, in respect of which it might become payable: but it will be observed that purchasers acquiring possession of property subject to a claim for account duty might apparently be liable to pay the duty. By the Finance Act, 1894 (*d*), estate duty was substituted for account duty, as regards property passing on any death occurring *after* the 1st of August, 1894 (*d*).

Additional succession duty.

By the Inland Revenue Act, 1888 (*e*), additional succession duties were imposed on successions on deaths occurring on or after the 1st of July, 1888; except in the case of leaseholds passing by will or devolution by law, or property on which account duty was payable. These duties were abolished by the Finance Act, 1894 (*f*), as regards any property chargeable with estate duty by reason of its passing on some death occurring after the 1st of August, 1894.

Temporary estate duty.

By the Inland Revenue Act, 1889 (*g*), a new duty, therein called estate duty, was temporarily imposed on or after the 1st of June, 1889, where the value of any property chargeable with probate or account duty exceeded ten thousand pounds, at the rate of 1*l*. per cent. on the value of such property. And the like duty was imposed, except in the case of leaseholds

(*c*) Stat. 44 Vict. c. 12, ss. 39, 40. Thus, the duty was payable by the donee, not by the donor, or out of his estate; *Re Foster*, 1897, 1 Ch. 484.

(*d*) Stat. 57 & 58 Vict. c. 30, ss. 1, 24, and First Schedule.

(*e*) Stat. 51 & 52 Vict. c. 8, s. 21 (1). These duties were at the rate of 10*s*. per cent. on the succession of any lineal issue or ancestor and 1*l*. 10*s*. per cent. in other cases. See above, p. 1194, n. (*q*).

(*f*) Stat. 57 & 58 Vict. c. 30, ss. 1, 24, and First Schedule.

(*g*) Stat. 52 Vict. c. 7, s. 5.

passing by will or devolution by law, or of property on which account duty had been paid, where the value of any succession on the death of any person dying on or after the 1st of June, 1889, exceeded 10,000*l.*, or the value of any succession to real property under the will or intestacy of any person so dying, together with any other benefit taken by the successor under such will or intestacy, exceeded the same sum (*h*). The last mentioned duty was to be assessed and paid like succession duty, and was to be subject to the enactments relating to succession duty (*i*): but it was to be charged on the principal value of the property, to be ascertained as directed in the Act, where the successor was entitled in fee simple or in fee according to the custom of any manor, or for lives renewable under any custom or under any lease for lives, or for any estate in tail, or was entitled for life and was also competent to dispose as he should think fit of a continuing interest in the property (*j*). This duty, where imposed on real property, was made a first charge thereon, or on the interest of the successor therein, according as the duty was or was not chargeable on the principal value of such property (*k*). The temporary estate duties were abolished by the Finance Act, 1894 (*l*), as regards any property chargeable with the estate duty imposed by that Act by reason of its passing on some death occurring after the 1st of August, 1894.

§ 3.—*Of estate duty.*

Estate duty.

By the Finance Act, 1894 (*m*), a new duty called estate duty was imposed on the principal value (*n*) of all property, real or

(*h*) Sect. 6 (1-3).
(*i*) Sect. 6 (4).
(*j*) Sect. 6 (5, *a*). The duty might be chargeable on an increase of benefit accruing to the successor and chargeable with succession duty; sect. 6 (5, *b*); see above, p. 1196.
(*k*) Sect. 6 (6).
(*l*) Stat. 57 & 58 Vict. c. 30, ss. 1, 24, and First Schedule.
(*m*) Stat. 57 & 58 Vict. c. 30, ss. 1, 24. This Act has been amended by stats. 59 & 60 Vict. c. 28, ss. 14-24; 61 & 62 Vict. c. 10, ss. 13, 14; 63 Vict. c. 7, ss. 11-14; 7 Edw. VII. c. 13, ss. 12-16; 10 Edw. VII. c. 8, ss. 54-64; 1 & 2 Geo. V. c. 48, ss. 18, 19; 2 & 3 Geo. V. c. 8, s. 9; 4 & 5 Geo. V. c. 10, ss. 12-16, 18, and First and Second Schedules; and 9 & 10 Geo. V. c. 32, ss. 29, 30, and Third Schedule, which gives the present rates of estate duty.
(*n*) See stat. 57 & 58 Vict. c. 30, s. 7, amended by 10 Edw. VII. c. 8, ss. 57, 60, 61, 62. The principal value is the price which, in the opinion of the Commissioners, the property would fetch if sold in the open market; see *Ellesmere* v. *Inland Revenue Commrs.*, 1918,

personal, settled or not settled, which passes on the death of any person dying after the 1st of August, 1894; and it was provided that probate duty, account duty, additional succession duty, temporary estate duty and legacy or succession duty at

2 K. B. 735. Allowance is made, as a rule, for funeral expenses, debts and incumbrances; see *Cowley* v. *Inland Revenue Commrs.*, 1899, A. C. 198; *A.-G.* v. *Montagu*, 1904, A. C. 316. But allowance shall not be made (a) for debts incurred by the deceased or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created *bonâ fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit, and take effect out of his interest; see *Re Gray*, 1896, 1 Ch. 620; *Re Maryon-Wilson*, 1900, 1 Ch. 565; *Re Hackett*, 1907, 1 Ch. 385; *A.-G.* v. *Richmond*, 1909, A. C. 466; *Re Hartland*, 1911, 1 Ch. 459; *Re Briggs*, 1914, 2 Ch. 413, 417; nor (b) for any debt in respect whereof there is a right to reimbursement from any other estate or person, unless such reimbursement cannot be obtained; nor (c) more than once for the same debt or incumbrance charged upon different portions of the estate; nor (d) for any debt or incumbrance incurred or created in whole or in part for the purpose of or in consideration for the purchase or acquisition or extinction, whether by operation of law or otherwise, of any interest in expectancy (see below, p. 1227, n. (*n*)) in any property passing or deemed to pass on the death of a person dying on or after the 29th April, 1910, where the person whose interest in expectancy is so purchased, acquired or extinguished, becomes, under any disposition made by, or through devolution of law from, or under the intestacy of the deceased, entitled to any interest in that property; and in such case any property charged with such debt or incumbrance shall be deemed to pass freed therefrom; provided that, if part only of such debt or incumbrance was so incurred or created, this provision shall apply to that part only, and if the person whose interest in expectancy is so purchased, &c. becomes entitled to an interest in part only of that property, this provision shall apply only to a part of the debt or incumbrance proportionate to the value of that part of that property as compared with the value of the whole of that property. This last provision was enacted in consequence of the decision in *A.-G.* v. *Richmond*, ubi sup.

Allowance for incumbrances.

Estate Duty on Timber.

By stat. 10 Edw. VII. c. 8, s. 61, sub-s. 5, as varied by 2 & 3 Geo. V. c. 8, s. 9, where an estate in respect of which estate duty is payable on the death of a person dying after the 30th April, 1909, comprises land on which timber, trees, wood, or underwood are growing, the value of such timber, trees, wood, or underwood shall not be taken into account in estimating the principal value of the estate or the rate of estate duty, and estate duty shall not be payable thereon, but shall, at the rate due to the principal value of the estate, be payable on the net moneys (if any), after deducting all necessary outgoings since the death of the deceased, which may from time to time be received from the sale of the timber, trees, wood, or underwood, when felled or cut, during the period which may elapse until the land, on the death of some other person, again becomes liable, or would, but for this sub-section, have become liable to estate duty, and the owners or trustees of such land shall account for and pay the same accordingly as and when such moneys are received with interest at the rate of three per cent. per annum from the date when such moneys are received: provided that if at any time the timber, trees and wood are sold, either with or apart from the land on which they are growing, the amount of estate duty on the principal value thereof which, but for this sub-section, would have been payable on the death of the deceased, after deducting the

the rate of 1*l.* per cent. (*o*) should not be levied in respect of property chargeable with such new estate duty. But as above noted, legacy and succession duty at the rate of 1*l.* per cent. have since been re-imposed, subject to the exemptions mentioned in the Finance (1909-10) Act, 1910 (*p*). By the Act of 1894, property (*q*) passing on the death (*r*) of a person so dying shall be deemed to include (1) property of which the deceased was at the time of his death competent to dispose (*s*); (2) property in which the deceased or any other person had an interest ceasing

amount (if any) of estate duty paid in respect of the timber, trees, wood, or underwood, under this sub-section since that date, shall become payable. It has been held that, where timber or other wood has been felled or cut since a death, on which estate duty became payable in respect of the land whereon the timber or wood was standing, estate duty becomes payable on the net moneys received from the sale of the timber or wood, and is not charged on the inheritance of the land; and such estate duty is therefore payable by a tenant for life without impeachment of waste, who has so felled or cut such timber or wood, and is not payable out of the inheritance or *corpus* of the settled land; *Re Smyth,* 1918, 1 Ch. 118. But where the timber or wood is sold after such a death, together with the land on which it is growing, and for this reason estate duty then becomes payable thereon, it appears that the duty is then charged on the property, that is, the timber or wood as a part of the land sold. Purchasers of land with timber, trees, wood or underwood growing thereon must, therefore, have regard to this liability, and should require any unpaid estate duty so charged on the land (see below, p. 1236) in respect of the timber, &c. to be discharged by the vendor before completion of the sale.

(*o*) Above, pp. 1190, 1191, 1194, n. (*q*), 1220, 1221.

(*p*) Stat. 10 Edw. VII. c. 8, s. 58 (2-4); above, p. 1194, n. (*q*).

(*q*) The expression "property" includes real and personal property and the proceeds of sale thereof respectively, and any money or investment for the time being representing the proceeds of sale; stat. 57 & 58 Vict. c. 30, s. 22 (1, *f*).

(*r*) The expression "property passing on the death" includes property passing either immediately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation; and the expression "on the death" includes "at a period ascertainable only by reference to the death"; sect. 22 (1, *l*).

(*s*) A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were *sui juris,* enable him to dispose of the property, including a tenant in tail, whether in possession or not; and the expression "general power" includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument *inter vivos,* or by will, or both, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself, or exercisable as tenant for life under the Settled Land Act, 1882, or as mortgagee; sect. 22 (2, *a*). A disposition taking effect out of the interest of the deceased person shall be deemed to have been made by him, whether the concurrence of any other person was or was not required; sect. 22 (2, *b*). And money which a person has a general power to charge on property shall be deemed to be property of which he has power to dispose; sect. 22 (2, *c*).

on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest (*t*); but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office (*u*), or recipient of the benefits of a charity, or as a corporation sole; (3) property which would be required on the death of the deceased to be included in an account under sect. 38 of the Customs and Inland Revenue Act, 1881, as amended by sect. 11 of the Customs and Inland Revenue Act, 1889, if those sections extended to real as well as personal property, and the words "voluntary" and "voluntarily" and a reference to a "volunteer" were omitted therefrom (*x*); and (4) any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased (*y*). Property passing on the death of the deceased when situate out of the United Kingdom shall be included only if, under the law in force before the passing of the Finance Act, 1894, legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes (*z*).

(*t*) See *A.-G.* v. *Boden,* 1912, 1 K. B. 539; *A.-G.* v. *Watson,* 1917, 2 K. B. 427 (cesser of annuity). As to the value of such a benefit for the purposes of the duty, see sect. 7 (7); *Adv.-Gen.* v. *Maclachlan,* 1900, W. N. 204.

(*u*) See *A.-G.* v. *Eyres,* 1909, 1 K. B. 723, where an annuity given to a trustee while acting as such was held to give him an interest only as holder of an office.

(*x*) See above, p. 1218, and n. (*u*), 1219, and n. (*x*), and note the amendments made by stat. 10 Edw. VII. c. 8, s. 59; *Grey* v. *A.-G.*, 1900, A. C. 124; *A.-G.* v. *Johnson,* 1903, 1 K. B. 617; *A.-G.* v. *Holden,* 1903, 1 K. B. 832; *A.-G.* v. *Seccombe,* 1911, 2 K. B. 688. By stat. 10 Edw. VII. c. 8, s. 59 (2), so much of sect. 2 (1) of the Finance Act, 1894, and of this enacting section as makes gifts *inter vivos* property which is deemed to pass on the death of the deceased shall not apply to gifts which are made in consideration of marriage, or which are proved to the satisfaction of the commissioners to have been part of the normal expenditure of the deceased and to have been reasonable, having regard to the amount of his income or to the circumstances, or which, in the case of any donee, do not exceed in the aggregate 100*l.* in value or amount. Where property has been conveyed by a father to his son for a *bonâ fide* valuable consideration, even though less than the full value thereof, no estate duty thereon is payable on the death of the father within three years; *Re Weir and Pitt's contract,* 55 Sol. J. 536.

(*y*) Stat. 57 & 58 Vict. c. 30, s. 2 (1). See *A.-G.* v. *Hawkins,* 1901, 1 K. B. 285; *A.-G.* v. *Murray,* 1904, 1 K. B. 165; *Lethbridge* v. *A.-G.*, 1907, A. C. 19.

(*z*) Stat. 57 & 58 Vict. c. 30, s. 2 (2); see above, p. 1194, n. (*q*);

Exemptions from estate duty.

1. Trust property.

2. Transactions for money consideration.

3. Property of common seamen, &c.

4. Sums under 100*l.* payable without representation.

5. Single annuity of 25*l.*

Estate duty is not payable under the Finance Act, 1894, in the following cases:—(1) In respect of property held by the deceased as trustee for another person, under a disposition not made by the deceased, or under a disposition made by the deceased more than three years before his death, where possession and enjoyment of the property was *bonâ fide* assumed by the beneficiary immediately upon the creation of the trust and thenceforward retained to the entire exclusion of the deceased or of any benefit to him by contract or otherwise (*a*). (2) In respect of property passing on the death of the deceased by reason only of a *bonâ fide* purchase from the person under whose disposition the property passes, or in respect of the falling into possession of the reversion on any lease for lives, or in respect of the determination of any annuity for lives, where such purchase was made, or such lease or annuity granted, for full consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or, in the case of a lease, for the use or benefit of any person for whom the grantor was a trustee (*b*). (3) In respect of the property of common seamen, marines, or soldiers, who are slain or die in the King's service. (4) In respect of sums under 100*l.* payable without requiring representation (*c*). (5) In respect of a single annuity not exceeding 25*l.*, purchased or provided by the deceased for the life of himself and of some other person and the survivor of them, or to arise on his own death in favour of some other

Wms. Pers. Prop. 493 and n. (*s*), 17th ed.; *A.-G.* v. *Jewish Colonization Assn.*, 1901, 1 Q. B. 123. This enactment exempts from the duty lands situate out of the country and passing as such (that is, in an unconverted state) on the death, whatever the form of tenure may be: but not the money secured by mortgage of lands abroad or the money which such lands represent, if converted in equity; *Lawson* v. *Commrs. of Inland Revenue*, 1896, I. R. 418; W. N. 1896, p. 145; *Forbes* v. *Steven*, L. R. 10 Eq. 178; *A.-G.* v. *Johnson*, 1907, 2 K. B. 885; Hanson, Death Duties, 113, 6th ed.

(*a*) Sect. 2 (3), as amended by stat. 10 Edw. VII. c. 8, s. 59 (1), substituting three years for twelve months; see above, pp. 1218, and n. (*u*), 1219, and n. (*x*), 1224.

(*b*) Stat. 57 & 58 Vict. c. 30, s. 3 (1); see *Lethbridge* v. *A.-G.*, 1907, A. C. 19; *A.-G.* v. *Boden*, 1912, 1 K. B. 539. Where such purchase was made, or lease or annuity granted, for partial consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or, in the case of a lease, for the use or benefit of any person for whom the grantor was a trustee, the value of the consideration shall be allowed as a deduction from the value of the property for the purpose of estate duty; sect. 3 (2). See *A.-G.* v. *Smith-Marriott*, 1899, 2 Q. B. 595; *A.-G.* v. *Johnson*, 1903, 1 K. B. 617.

(*c*) Sect. 8 (1); see Hanson, Death Duties, 171, 172, 6th ed.

6. Objects of national, scientific, or historic interest given for national purposes, &c.

7. Indian Government pensions.

8. Advowson.

9. Estates not exceeding 100*l.*

10. (On deaths before 16th August, 1914.) Property settled by disposition of one dying before 2nd August, 1894, if probate or account duty paid or payable.

person (*d*). (6) If the Treasury remit the duty, as they lawfully may, in respect of such pictures, prints, books, manuscripts, works of art or scientific collections as appear to the Treasury to be of national, scientific or historic interest and to be given or bequeathed for national purposes, or to any university or to any county council or municipal corporation (*e*). (7) In respect of any pension or annuity payable by the Government of British India to the widow or child of any deceased officer of such Government (*f*). (8) In respect of any advowson or church patronage or the proceeds of sale thereof (*g*). (9) Where the principal value of the estate does not exceed 100*l.* (*h*). (10) In cases of death before the 16th August, 1914, in respect of personal property settled by a will or disposition made by a person dying before the 2nd of August, 1894, in respect of which property probate or account duty has been paid or is payable (*i*); unless in either case the deceased was at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property (*k*); but for the purpose of any claim to relief from estate duty under this provision in the case of persons dying on or after the 30th April, 1909, payment of or liability to duty, whether the payment was made or the liability attached before, on or after that date, shall not be deemed to be a payment of or liability to duty in respect of settled property if the payment was made, or the liability attached, in respect of an interest in expectancy

(*d*) Sect. 15 (1). If there is more than one such annuity, the annuity first granted is alone entitled to the exemption.

(*e*) Sect. 15 (2).

(*f*) Sect. 15 (3).

(*g*) Sect. 15 (4) expressly exempts from estate duty advowsons which would be free from succession duty. But succession duty does not attach until sale, and since the advowson at the time it passes on death is thus free from succession duty, it is free from estate duty; *A.-G.* v. *Peek*, 1912, 2 K. B. 192, affd. 1913, 2 K. B. 487; above, p. 1199, n. (*n*).

(*h*) Sect. 17, now replaced by stat. 9 & 10 Geo. V. c. 32, s. 29.

(*i*) See *Re Torrington*, 1913, 2 Ch. 623.

(*k*) Stat. 57 & 58 Vict. c. 30, s. 21 (1); *A.-G.* v. *Dodington*, 1897, 2 Q. B. 373; *A.-G.* v. *Londesborough*, 1905, 1 K. B. 98; see above, p. 1223, n. (*s*). By the Finance Acts, 1896 and 1907 (stats. 59 & 60 Vict. c. 28, s. 21; 7 Edw. VII. c. 13, s. 15), where estate duty becomes payable in respect of any property passing under a settlement made before the 2nd August, 1894, and before that date additional succession duty, temporary estate duty, or legacy or succession duty at the rate of one per cent. has been paid or become payable under the instrument creating the settlement on the capital value of the property, the deduction therein provided on account of any such duty is to be allowed from the estate duty payable.

in any property on the death of a person other than the settlor (*l*). This exemption was abolished in cases of death after the 15th of August, 1914, except as to estate duty on the death of a widow or widower of one on whose death probate or account duty was paid (*m*). (11) Where an interest in expectancy (*n*) in any property has, before the 2nd of August, 1894, been *bonâ fide* sold or mortgaged for full consideration in money or money's worth, then no other duty on such property shall be payable by the purchaser or mortgagee when the interest falls into possession than would have been payable if this Act had not passed; and in the case of a mortgage, any higher duty payable by the mortgagor shall rank as a charge subsequent to that of the mortgagee (*o*). (12) Where a husband or wife is entitled, either solely or jointly with the other, to the income of any property settled by the other under a disposition which has taken effect before the 2nd of August, 1894, and on his or her death the survivor becomes entitled to the income of the property settled by such survivor, estate duty shall not be payable in respect of that property until the death of the survivor (*p*). (13) Estate duty in respect of property passing on any death shall not be more than once levied on the same death (*q*). The following cases of exemption were added by the Finance Act, 1896 (*r*), with regard to deaths occurring on or after the 1st of July, 1896, namely:—(14) Where property is settled by a person on himself for life, and after his death on any other persons with an ultimate reversion of an absolute interest or

As to deaths after 15th August, 1914.

11. Where interest in expectancy sold or mortgaged before 2nd August, 1894.

12. Settlement by husband or wife on the other of them before 2nd August, 1894.

13. Property passing in more ways than one on the same death.

14. Reversion to settlor on settlement on himself for life and

(*l*) Stat. 10 Edw. VII. c. 8, s. 55.

(*m*) Finance Act, 1914 (4 & 5 Geo. V. c. 10), s. 14.

(*n*) This expression includes an estate in remainder or reversion and every other future interest whether vested or contingent, but does not include reversions expectant upon the determination of leases; stat. 57 & 58 Vict. c. 30, s. 22 (1, *j*).

(*o*) Stat. 57 & 58 Vict. c. 30, s. 21 (3). See *Re Vernon*, 1901, 1 Q. B. 297; above, p. 392 and n. (*c*). Similar provision was made in case of sales and mortgages before the 11th of May, 1914, by the Finance Act, 1914 (4 & 5 Geo. V. c. 10), s. 16, and before the 30th of April, 1919, by the Finance Act, 1919 (9 & 10 Geo. V. c. 32), s. 29, by reason of the increase in the rates of estate duty under these Acts.

(*p*) Sect. 21 (5); held not to apply where the survivor becomes entitled to the capital of the property settled; *A.-G.* v. *Strange*, 1898, 2 Q. B. 39; see also *A.-G.* v. *Glossop*, 1906, 1 K. B. 284, 290 *sq.*, affd. 1907, 1 K. B. 163.

(*q*) Stat. 57 & 58 Vict. c. 30, s. 7 (10). This provision may take effect where property is settled on A. for life, then on B. for life and then on C. absolutely, and A. in B.'s lifetime acquires C.'s interest by succession after C.'s death and dies.

(*r*) Stat. 59 & 60 Vict. c. 28, s. 24.

others, if falling in while settlor entitled in possession.

absolute power of disposition to the settlor, no estate duty is payable in respect of the enlargement of the settlor's interest by reason of the death of any such other person while the settlor remains in possession of the property as tenant for life (*s*).

15. Reversion on disposition to another or others for life, if falling in in disponer's lifetime.

(15) Where by a disposition of any property an interest is conferred on any person other than the disponer for the life of such person or determinable on his death, and such person enters into possession of the interest and thenceforward retains possession thereof to the entire exclusion of the disponer or of any benefit to him by contract or otherwise, and the only benefit which the disponer retains in the said property is subject to such life or determinable interest, and no other interest is created by the said disposition, no estate duty is payable on the death of such person in the disponer's lifetime by reason only of the property reverting to the disponer (*t*); and the law is the same where a similar disposition is made in favour of two or more persons, either severally or jointly or in succession (*u*): but this exemption is not given if the person or persons taking such life or determinable interests had at any time prior to the disposition been competent to dispose of the property (*x*).

16. On death of husband entitled to wife's real or leasehold property in her lifetime.

(16) No estate duty is payable where a husband entitled by law to the rents and profits of his wife's real or leasehold property dies in her lifetime (*y*).

17. Objects of national, scientific, historic or artistic interest.

(17) Where any property passing on the death of a deceased person consists of such pictures, prints, books, manuscripts, works of art, scientific collections, or other things not yielding income as appear to the Treasury to be of national, scientific, or historic interest, and is settled so as to be enjoyed in kind in succession by different persons, such property shall, while enjoyed in kind (*z*) by a person not competent to dispose of the same, be exempt from estate duty: but if such property be sold or come into the possession of some person competent to dispose of the same (*a*), it will become liable to estate duty (*b*). This exception was extended by the Finance (1909-10) Act,

(*s*) Sect. 14; see *A.-G.* v. *Glossop,* 1907, 1 K. B. 163, 177.

(*t*) Sect. 15 (1); see *A.-G.* v. *Glossop,* 1907, 1 K. B. 163.

(*u*) Sect. 15 (2).

(*x*) Sect. 15 (3); see above, p. 1223, n. (*s*).

(*y*) Sect. 15 (4).

(*z*) Enjoyment in kind, though only for a most transient period, satisfies these words; *Re Scott,* 1916, 2 Ch. 268.

(*a*) See above, p. 1223, n. (*s*).

(*b*) Sect. 20.

1910 (*c*), in the case of any person dying on or after the 30th April, 1909, so as to take effect whether the property in respect of which the exemption is given is settled or not, and as if the reference to national, scientific or historic interest included a reference to artistic interest; and it was provided that the duty shall only become chargeable when the property is sold, and then only in respect of the last death on which the property passed. And after 4th August, 1921, duty is not chargeable on the sale if this is to the National Gallery, British Museum, or other similar national institution, any University, any county council, any municipal corporation, in the United Kingdom, or the National Art Collections Fund (*d*). (18) By the Finance Act, 1900 (*e*), where any person dies from wounds inflicted, accident occurring, or disease contracted, within twelve months before death, while on active service against an enemy, whether on sea or land, and was, when the wounds were inflicted, the accident occurred, or the disease was contracted, either subject to the Naval Discipline Act or subject to military law, whether as an officer, non-commissioned officer, or soldier, under Part V. of the Army Act, the Treasury may, if they think fit, on the recommendation of the Secretary of State or of the Admiralty, as the case requires, remit, or in the case of duty already paid repay, up to an amount not exceeding 150*l.* in any one case, the whole or any part of the death duties (*f*) leviable in respect of property passing upon the death of the deceased to his widow or lineal descendants if the total value for the purpose of estate duty of the property so passing does not exceed 5,000*l.* These provisions were amended and extended on several important points as respects persons killed during the late war (*g*), and were applied by the Finance Act, 1921 (*h*), to persons dying from causes arising directly out of the then present disorders in Ireland.

18. Persons killed in war.

Persons killed during the late war.

During disorders in Ireland.

(*c*) Stat. 10 Edw. VII. c. 8, ss. 63, 96 (1) and Sixth Schedule.

(*d*) Finance Act, 1921 (11 & 12 Geo. V. c. 32), s. 44.

(*e*) Stat. 63 Vict. c. 7, s. 14, which is to take effect in the case of any person dying since the 11th Oct. 1899.

(*f*) *I.e.*, estate, legacy, and succession duty, and also probate, account, additional succession and temporary estate duty.

(*g*) See stats. 4 & 5 Geo. V. c. 76; 7 & 8 Geo. V. c. 31, s. 29 (extension to masters and crews of ships or fishing boats); 8 & 9 Geo. V. c. 15, s. 44; 9 & 10 Geo. V. c. 32, s. 31.

(*h*) Stat. 11 & 12 Geo. V. c. 32, s. 43, applying by sub-sect. 4 to deaths from any such causes arising at any time after the 31st Dec. 1918, and before such date as His Majesty may by Order in Council fix.

Settled property.

Under the Finance Act, 1894, where property in respect of which estate duty was leviable, was settled (*i*) by the will of the deceased, or having been settled by some other disposition passed under that disposition on the death of the deceased to some person not competent to dispose of the property (*k*), a further estate duty (called settlement estate duty (*l*)) on the principal value of the settled property was levied, except where the only life interest in the property after the death of the deceased was that of a wife or husband of the deceased; but during the continuance of the settlement the settlement estate duty was not payable more than once (*m*). The rate of settlement estate duty was originally one per cent., but was raised to two per cent. in the case of persons dying on or after the 30th of April, 1909 (*n*). If estate duty had already been paid in respect of any settled property since the date of the settlement, the estate duty was not payable in respect thereof, until the death of a person who was at the time of his death or had been at any time during the continuance of the settlement competent to dispose

Settlement estate duty.

Estate duty formerly payable once only during the continuance of a settlement.

(*i*) Settlement estate duty was payable where property was settled contingently only; *A.-G.* v. *Fairley*, 1897, 1 Q. B. 698; *A.-G.* v. *Clarkson*, 1900, 1 Q. B. 156; *Smith* v. *Lord Advocate*, 1902, W. N. 167. But by the Finance Act, 1898, where in the case of a death occurring on or after the 1st July, 1898, settlement estate duty was paid in respect of any property contingently settled, and it was thereafter shown that the contingency had not arisen and could not arise, the said duty so paid was to be repaid; stat. 61 & 62 Vict. c. 10, s. 14. Property is settled within the meaning of the Finance Act, 1894, when it is made subject to a disposition which would be a settlement within the meaning of the Settled Land Act, 1882; stats. 45 & 46 Vict. c. 38, s. 2; 57 & 58 Vict. c. 30, s. 22 (1, *h*, *i*); see *A.-G.* v. *Owen*, 1899, 2 Q. B. 253; *Re St. Albans*, 1900, 2 Ch. 873; *Re Campbell*, 1902, 1 K. B. 113.

(*k*) See above, p. 1223, n. (*s*).

(*l*) Settlement estate duty was not payable in respect of property settled by a disposition which had taken effect before the 2nd August, 1894; stat. 57 & 58 Vict. c. 30, s. 21 (4); or in respect of property settled by a will, where the net value of the property, on which estate duty was leviable (exclusive of property settled otherwise than by the will) did not exceed 1,000*l*., and the fixed duty or estate duty had been paid thereon; sect. 16 (3); stat. 10 Edw. VII. c. 8, s. 58 (2); see above, p. 1195, n. (*q*). And the duty was not payable on the death of the settlor by a deed of voluntary conveyance where the settlor died within three years; *A.-G.* v. *Milne*, 1914, A. C. 765.

(*m*) Stat. 57 & 58 Vict. c. 30, s. 5 (1).

(*n*) Stat. 10 Edw. VII. c. 8, s. 54, replacing 57 & 58 Vict. c. 30, s. 17. By stat. 57 & 58 Vict. c. 30, s. 5 (4), the amount of the *ad valorem* stamp duty, if any, charged on the settlement in respect of the settled property might be deducted from the settlement estate duty payable.

of such property (*o*), and who, if on his death subsequent limitations under the settlement took effect in respect of such property, was *sui juris* at the time of his death or had been *sui juris* at any time while so competent to dispose of the property (*p*). But for the purpose of any claim to relief from estate duty under these provisions in the case of persons dying on or after the 30th April, 1909, payment of or liability to duty, whether the payment was made or the liability attached before, on or after that date, was not to be deemed to be a payment of or liability to duty in respect of settled property if the payment was made or the liability attached in respect of an interest in expectancy (*q*) in any property on the death of a person other than the settlor (*r*). Settlement estate duty leviable in respect of a legacy or other personal property settled by will was payable out of the settled legacy or property in exoneration of the rest of the testator's estate; unless the will contained an express provision to the contrary (*s*).

Abolition of settlement estate duty.

Settlement estate duty was abolished by the Finance Act, 1914 (*t*), in the case of persons dying after the 11th of May, 1914, and it was thereby provided that the relief from payment of estate duty during the continuance of the settlement (*u*) should cease in the case of any person dying after the 15th of August, 1914; but this was not to affect that relief in cases where, before or after the passing of this Act, estate duty had been paid or was payable upon the death of one of the parties to a marriage

(*o*) See above, p. 1223, n. (*s*).

(*p*) Stat. 57 & 58 Vict. c. 30, s. 5 (2), amended by stat. 61 & 62 Vict. c. 10, s. 13. See *A.-G.* v. *Hay*, 1899, 2 Q. B. 245; *Commrs. of Inland Revenue* v. *Priestley*, 1901, A. C. 208. This exemption originally extended to legacy and succession duty at the rate of one per cent., but it appears that such duty is now payable under the Finance (1909-10) Act, 1910, in the cases and with the exemptions therein provided; stat. 10 Edw. VII. c. 8, s. 58; see above, p. 1194, n. (*q*).

(*q*) Above, p. 1227, n. (*n*).

(*r*) Stat. 10 Edw. VII. c. 8, s. 55.

(*s*) Stat. 59 & 60 Vict. c. 28, s. 19 (1), reversing the rule in *Re Webber*, 1896, 1 Ch. 914; held not retrospective, *Re Gibbs*, 1898, 1 Ch. 625; but see *Re Maryon-Wilson*, 1900, 1 Ch. 565; *Re St. Albans*, 1900, 2 Ch. 873. Such settlement estate duty did not come under the head of testamentary expenses; *Re King*, 1904, 1 Ch. 363; cf. *Re Manchester*, 1912, 1 Ch. 540, 556 *sq.* As to "an express provision to the contrary," see *Re Cayley*, 1904, 2 Ch. 781; *Re Turnbull*, 1905, 1 Ch. 726.

(*t*) Stat. 4 & 5 Geo. V. c. 10, s. 14.

(*u*) That is the relief given by sect. 5 (2) of the Finance Act, 1894, above, p. 1230.

so far as respects the estate duty on the death of the other party. By the Act of 1894, in the case of settled property, where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist, the property shall not be deemed to pass on his death (*x*). This enactment still remains in force.

Death before interest falls into possession.

Estate duty now payable on death of every one entitled in possession under a settlement.

Sole exception.

Relief where settlement estate duty has been paid.

Relief in respect of quick succession to land or a business.

The effect of these provisions is that, where land or other property has been settled on several persons successively for their lives respectively, with remainder to others in tail or in fee or absolutely, estate duty is now payable on the death of every person entitled under the settlement, whether for life or otherwise, who has enjoyed an estate or interest in possession; except only on the death of the widow or widower of one, on whose death estate duty was payable by reason of the cesser of some estate or interest of his or hers under the settlement. But where settlement estate duty has been already paid under the settlement, the relief stated in the note is afforded (*y*). And where the Commissioners of Inland Revenue are satisfied that estate duty has become payable on any property consisting of land or a business (not being a business carried on by a company), or any interest in land or such a business, passing on the death of any person, and that subsequently within five years estate duty has again become payable on the same property or any part thereof passing on the death of the person, to whom the property passed on the first death, the amount of estate duty payable on the second death (if that death occurs after the passing of the

(*x*) Stat. 57 & 58 Vict. c. 30, s. 5 (3); *A.-G.* v. *Wood,* 1897, 2 Q. B. 102; *A.-G.* v. *Glossop,* 1907, 1 K. B. 163.

(*y*) On the first occasion on which estate duty becomes payable in respect of any property, which would not have been payable but for sect. 14 of the Finance Act, 1914, the amount of settlement estate duty, if any, which has been paid in respect of that property, is to be allowed against the amount of estate duty payable on that occasion; and if it exceeds that amount, the excess is to be repaid to the estate, and, in addition, a sum equal to simple interest on the said amount of settlement estate duty, calculated at the rate of three per cent. per annum from the 15th Aug. 1914, up to the date of the occasion, is to be paid to the several persons or their representatives who would have been entitled to the income arising from that amount, if that amount had, on the 15th Aug. 1914, been added to the capital of the settled property, and is to be divided amongst those persons according to the several interests they would have had in that income; stat. 4 & 5 Geo. V. c. 10, s. 14 (b); see *Re Booth,* 1916, 1 Ch. 349; *Re Sutherland,* 1922, 2 Ch. 782.

Finance Act, 1914 (*z*)) in respect of the property so passing is to be reduced as stated in the note (*a*).

Property settled inalienably by statute or Royal grant.

Where any lands or chattels are so settled, whether by Act of Parliament or Royal grant, that no one of the persons successively in possession thereof is capable of alienating the same, whether his interest is in law a tenancy for life or a tenancy in tail, the provisions of the Finance Act, 1894, with respect to settled property shall not apply, and the property passing on the death of any person in possession of the lands and chattels shall be the interest of his successor in the lands and chattels, and such interest shall be valued, for the purpose of estate duty, in like manner as for the purpose of succession duty (*b*).

Rate of estate duty.

The rate of estate duty is now graduated according to the value of the estate as stated in the note (*c*); and for determining the rate of duty to be paid, all property passing on the death of the deceased and chargeable with estate duty is required, as a rule, to be aggregated so as to form one estate (*d*).

Persons accountable for estate duty.

The executor or administrator of the deceased is required to specify in appropriate accounts all the property in respect of which estate duty is payable upon the death of the deceased, and is accountable for the estate duty in respect of all personal property wheresoever situate of which the deceased was competent to dispose at his death, but is not liable for any duty in

(*z*) Stat. 4 & 5 Geo. V. c. 10, passed 31st July, 1914.

(*a*) Where the second death occurs within the following times after the first death, the following reductions are to be made, respectively, viz., one year, 50 per cent.; two years, 40 per cent.; three years, 30 per cent.; four years, 20 per cent.; five years, 10 per cent.

Provided that where the value, on which the duty is payable, of the property on the second death exceeds the value, on which the duty was payable, of the property on the first death, the latter value is to be substituted for the former for the purpose of calculating the amount of duty on which the above reduction is to be calculated; stat. 4 & 5 Geo. V. c. 10, s. 15. As to cases in which this relief coincides with the relief given on the deaths of persons killed during the late war (above, p. 1229), see stat. 4 & 5 Geo. V. c. 76, s. 1 (3).

(*b*) Sect. 5 (5); *Re Bolton Estates Act* (1863), 1904, 1 Ch. 289; above, pp. 1198-1201.

(*c*) See next page, n. (*c*).

(*d*) See stats. 57 & 58 Vict. c. 30, ss. 4, 7 (10), 15 (2), 16 (3); 59 & 60 Vict. c. 28, s. 20 (1); 63 Vict. c. 7, s. 12; 7 Edw. VII. c. 13, s. 16. As to aggregation where property passes on a death after the Finance Act, 1894, under a disposition made by a person dying before that Act, see *A.-G.* v. *Thynne*, 1914, 1 K. B. 351.

excess of the assets which he has received as executor or administrator or might but for his own neglect or default have received (*e*). Where property passes on the death of the deceased, and his executor or administrator is not accountable for the estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other

(*c*) Where the principal value of the Estate						At the rate per cent. of
Exceeds	£100	and	does	not	exceed £500	1
,,	500	,,	,,	,,	1,000	2
,,	1,000	,,	,,	,,	5,000	3
,,	5,000	,,	,,	,,	10,000	4
,,	10,000	,,	,,	,,	15,000	5
,,	15,000	,,	,,	,,	20,000	6
,,	20,000	,,	,,	,,	25,000	7
,,	25,000	,,	,,	,,	30,000	8
,,	30,000	,,	,,	,,	40,000	9
,,	40,000	,,	,,	,,	50,000	10
,,	50,000	,,	,,	,,	60,000	11
,,	60,000	,,	,,	,,	70,000	12
,,	70,000	,,	,,	,,	90,000	13
,,	90,000	,,	,,	,,	110,000	14
,,	110,000	,,	,,	,,	130,000	15
,,	130,000	,,	,,	,,	150,000	16
,,	150,000	,,	,,	,,	175,000	17
,,	175,000	,,	,,	,,	200,000	18
,,	200,000	,,	,,	,,	225,000	19
,,	225,000	,,	,,	,,	250,000	20
,,	250,000	,,	,,	,,	300,000	21
,,	300,000	,,	,,	,,	350,000	22
,,	350,000	,,	,,	,,	400,000	23
,,	400,000	,,	,,	,,	450,000	24
,,	450,000	,,	,,	,,	500,000	25
,,	500,000	,,	,,	,,	600,000	26
,,	600,000	,,	,,	,,	800,000	27
,,	800,000	,,	,,	,,	1,000,000	28
,,	1,000,000	,,	,,	,,	1,250,000	30
,,	1,250,000	,,	,,	,,	1,500,000	32
,,	1,500,000	,,	,,	,,	2,000,000	35
,,	2,000,000	.....				40

See stat. 9 & 10 Geo. V. c. 32, s. 29 and Third Schedule; and see also stat. 4 & 5 Geo. V. c. 10, s. 13.

For the earlier rates, see stats. 57 & 58 Vict. c. 30, s. 17; 7 Edw. VII. c. 13, s. 12; 10 Edw. VII. c. 8, s. 54; and 4 & 5 Geo. V. c. 10, s. 12.

(*e*) Stat. 57 & 58 Vict. c. 30, s. 8 (3); *Re Manchester*, 1912, 1 Ch. 540.

person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the estate duty on the property (*f*); but a *bonâ fide* purchaser for valuable consideration without notice is not rendered liable to or accountable for duty (*g*).

Estate duty when payable.

Estate duty in respect of all personal property of which the deceased person was competent to dispose (*h*) at his death is payable by his executor or administrator on delivering the affidavit necessary to obtain probate or administration; and the estate duty on any other property passing on the death may be paid by the executor or administrator at the same time, if the property be under his control by virtue of any testamentary disposition of the deceased or if the persons accountable for the duty so request (*i*). Otherwise the duty on such other property is to be collected upon an account setting forth the particulars of the property and to be delivered to the Commissioners by the person accountable for the duty within six months after the death or within such further time as the Commissioners may allow (*k*). But where an estate includes an interest in expectancy (*l*), estate duty in respect of that interest may be paid, at the option of the person accountable for the duty, either with the duty in respect of the rest of the estate or when the interest falls into possession (*m*). Interest at the rate of four per cent. per annum is payable on the estate duty from the date of the death up to the date of the delivery of the affidavit or account, or the expiration of six months after the death, whichever first happens (*n*). The duty to be collected upon an affidavit or account as before mentioned becomes due on the delivery thereof, or on the expiration of six months from the death, whichever

(*f*) Sect. 8 (4).
(*g*) Sect. 8 (18).
(*h*) See above, p. 1223, n. (*s*).
(*i*) Stat. 57 & 58 Vict. c. 30, s. 6 (2); see also sect. 14.
(*k*) Sect. 6 (4).
(*l*) See above, p. 1227, n. (*n*).
(*m*) Sect. 7 (6). If payment be delayed till the interest falls into possession, the duty will then be payable on its value as an interest in possession; *Re Eyre*, 1907, 1 K. B. 331.
(*n*) Sect. 6 (6), amended by stats. 59 & 60 Vict. c. 28, ss. 18, 40, and 9 & 10 Geo. V. c. 32, s. 30.

Estate duty on real property.

first happens (*o*). But the duty due upon an account of real property may, at the option of the person delivering the account, be paid by eight equal yearly instalments, or sixteen half-yearly instalments, commencing at the end of one year from the death, with interest at the rate of four per cent. per annum, as from the time of payment of the first instalment, on the amount of duty for the time being remaining unpaid. The duty for the time being unpaid may however be paid at any time, with interest to the date of payment; and in case the property is sold, the duty and interest shall be paid on completion of the sale or shall be duty in arrear (*p*). Under the Finance Act, 1896 (*q*), the estate duty on annuities may be paid by four yearly instalments commencing at the end of a year from the death.

Charge of estate duty.

A rateable part of the estate duty on an estate in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable; provided that the property shall not be so chargeable as against a *bonâ fide* purchaser thereof for valuable consideration without notice (*r*). A person authorized or required (*s*) to pay the estate duty in respect of any property shall, for the purpose of paying the duty, or raising the amount of the duty when already paid, have power, whether the property is or is not vested in him, to raise the amount of such duty, and any interest and expenses properly paid or incurred by him in respect thereof, by the sale or mortgage of or a terminable charge on that property or any part thereof (*t*). And a person having a limited interest in any property, who pays the estate duty in respect of that property, shall be entitled to the like

Power to raise the money.

Charge in favour of limited owner paying the estate duty.

(*o*) Stat. 57 & 58 Vict. c. 30, s. 6 (7).

(*p*) Sect. 6 (8), amended by stat. 59 & 60 Vict. c. 28, ss. 18, 40, and 9 & 10 Geo. V. c. 32, s. 30.

(*q*) Stat. 59 & 60 Vict. c. 28, s. 16.

(*r*) Stat. 57 & 58 Vict. c. 30, s. 9 (1). See *Re Parker-Jervis*, 1898, 2 Ch. 643; *Re St. Albans*, 1900, 2 Ch. 873. The charge so created has been described as an equitable charge by Cozens-Hardy, L. J., *Re Hole*, 1906, 1 Ch. 673, 682, and Joyce, J., *Re Bowerman*, 1908, 2 Ch. 340, 343; but it is respectfully submitted that, being created by a statute, of which all Courts (whether exercising legal or equitable jurisdiction) must take notice, it confers a legal interest on the Crown; see *Lord Advocate* v. *Moray*, 1905, A. C. 531, 537, 541, 542.

(*s*) See above, pp. 1233-1235.

(*t*) Sect. 9 (5); see *Re Parker-Jervis*, 1898, 2 Ch. 643, 648, 658; *Re Howe's Settled Estates*, 1903, 2 Ch. 69.

charge as if the estate duty in respect of that property had been raised by means of a mortgage to him (*u*).

Certificate of discharge from estate duty.

The Commissioners of Inland Revenue, on being satisfied that the full estate duty has been or will be paid in respect of an estate or any part thereof, shall, if required by the person accounting for the duty, give a certificate to that effect, which shall discharge from any further claim for estate duty the property shown by the certificate to form the estate or part thereof, as the case may be (*x*). And where a person accountable for the estate duty in respect of any property passing on a death applies to the Commissioners, and delivers to them and verifies a full statement to the best of his knowledge and belief of all property passing on such death and the several persons entitled thereto, the Commissioners may determine the rate of the estate duty in respect of the property for which the applicant is accountable, and on payment of the duty at that rate, that property and the applicant so far as regards that property shall be discharged from any further claim for estate duty, and the Commissioners shall give a certificate of such discharge (*y*). Any certificate given as above mentioned shall not discharge any person or property from estate duty in case of fraud or failure to disclose material facts (*z*): but any such certificate purporting to be a discharge of the whole estate duty payable in respect of any property included in the certificate shall exonerate a *bonâ fide* purchaser for valuable consideration without notice from the duty, notwithstanding any such fraud or failure (*a*).

Commutation of estate duty on interest in expectancy.

The Commissioners are authorized in their discretion, upon the application of a person entitled to an interest in expec-

(*u*) Sect. 9 (6); see *Lord Advocate* v. *Moray*, 1905, A. C. 531, 539, 541, 542. A tenant in tail (who has not disentailed) has such a limited interest; *Re Anson*, 1915, 1 Ch. 52. Where the heir of one dead intestate is also entitled to succeed to the dead man's personalty or some share of it, and the estate duty on the dead man's realty is paid out of his personalty, there is no charge on the realty of the amount paid for estate duty, or such part thereof as was paid out of or should be attributed to such share of the personalty; see *Re Hole*, 1906, 1 Ch. 673, 679, 682; *Re Wilson*, 1916, 1 Ch. 220, 224. But if such duty is paid out of any personalty devolving differently from the realty, there is a charge on the realty to that extent; see *SS.CC.*

(*x*) Stat. 57 & 58 Vict. c. 30, s. 11 (1).

(*y*) Sect. 11 (2), as amended by stat. 7 Edw. VII. c. 13, s. 14.

(*z*) Stat. 57 & 58 Vict. c. 30, s. 11 (3).

(*a*) Sect. 11 (4).

Composition for any death duties.

tancy (*b*), to commute the estate duty, which would or might become payable in respect of such interest (*c*). And where it is difficult to ascertain exactly the amount of death duties (*d*) or any of them payable in respect of any property or any interest therein, the Commissioners are authorized, on the application of any person accountable for any duty thereon, to accept a sum to be assessed by them in full discharge of all claims for death duties in respect of such property or interest (*e*). By the Finance (1909-10) Act, 1910 (*f*), the Commissioners may, if they think fit, accept in satisfaction of any estate duty or settlement estate duty payable in respect of any real or leasehold property such part of the property as may be agreed on between them and the person liable to pay the duty. And by the Finance Act, 1917, any war stock or bonds may be accepted in payment of any death duty (*g*).

Power to accept land in satisfaction of the duty.

Estate duty as compared with succession duty.

It will have been observed that estate duty, like succession duty, becomes payable on the death of any person in respect of the property devised or bequeathed by his will or devolving by reason of his intestacy, and also on the death of any person entitled as tenant for life (*h*) or otherwise (for instance, as grantee of a rentcharge for life (*i*)) under a settlement in respect of the beneficial interest to which any other person succeeds on such death (*k*). But there is a marked difference between succession duty and estate duty in this; that the liability to succession duty is created by the disposition, whereby one becomes beneficially entitled to property on the death of another, whilst estate duty is charged in respect of the passing of property on a death (*l*). This causes a substantial distinction in

(*b*) See above, p. 1227, n. (*n*).
(*c*) Stat. 57 & 58 Vict. c. 30, s. 12.
(*d*) This includes all the duties mentioned above, p. 1229, n. (*f*); sect. 13 (3).
(*e*) Sect. 13 (1).
(*f*) Stat. 10 Edw. VII. c. 8, s. 56 (1). By sect. 56 (2), no stamp duty is payable on any conveyance or transfer of land to the Commissioners under this section.
(*g*) Stat. 7 & 8 Geo. V. c. 31, s. 34.
(*h*) It has been held that in this case the property passes on the death of the tenant for life to the remainderman, and estate duty is payable under sect. 1 of the Finance Act, 1894, and not under sect. 2 (1, *b*) as on property in which the deceased had an interest ceasing on his death; *Cowley* v. *Inland Revenue Commrs.*, 1899, A. C. 198.
(*i*) See *Advocate General* v. *Maclachlan*, 1900, W. N. 204.
(*k*) See above, pp. 1223, 1224.
(*l*) Above, pp. 1193, 1223.

the case of a settlement. Thus when lands are settled for successive estates for life or in tail, with an ultimate remainder in fee, succession duty is at once prospectively charged on the various beneficial interests limited to take effect on the deaths; and the liability to succession duty is not affected by the merger of any life estate (*m*). Estate duty, however, is not in any way charged on property so settled until it passes on some death. It was therefore held that, under the Finance Act, 1894, if the estate of a tenant for life under a settlement ceased in his lifetime by merger or otherwise, no estate duty would be payable on his death (*n*). But the rule so laid down was modified by the Finance Act, 1900 (*o*), whereby in the case of every person dying after the 31st of March, 1900, property, whether real or personal, in which the deceased person or any other person had an estate or interest limited to cease on the death of the deceased should, for the purpose of the Finance Act, 1894, and the Acts amending that Act, be deemed to pass on the death of the deceased, notwithstanding that that estate or interest had been surrendered, assured, divested, or otherwise disposed of, whether for value or not, to or for the benefit of any person entitled to an estate or interest in remainder or reversion in such property, unless that surrender, assurance, divesting, or disposition was *bonâ fide* made or effected twelve months before the death of the deceased, and *bonâ fide* possession and enjoyment of the property was assumed thereunder immediately upon the surrender, assurance, divesting, or disposition, and thenceforward retained to the entire exclusion of the person who had the estate or interest limited to cease as aforesaid, and of any benefit to him by contract or otherwise (*p*). And by the Finance (1909-10) Act, 1910 (*q*), the above-mentioned period of twelve

(*m*) Above, pp. 1195, 1203.

(*n*) *A.-G.* v. *Beech*, 1899, A. C. 53; *A.-G.* v. *De Préville*, 1900, 1 Q. B. 223.

(*o*) Stat. 63 Vict. c. 7, s. 11.

(*p*) See above, pp. 1219, 1224; and as to surrenders made between 15th Aug. 1914, and 1st April, 1915, see Finance Act, 1914 (4 & 5 Geo. V. c. 10), s. 14 (c).

(*q*) Stat. 10 Edw. VII. c. 8, s. 59 (1); see above, p. 1218, n. (*u*), 1219, n. (*x*), 1224. By sect 59 (3), where property affected by such a surrender, assurance, divesting, or disposition as aforesaid is deemed to be property passing on the death of the deceased by reason only that the property was not, as from the date of the surrender, assurance, or divesting, retained to the entire exclusion of the deceased or a person who had an estate or interest limited to cease on the death of the deceased, and of any benefit to him by contract or otherwise, the property shall not be deemed to pass on the death of the deceased if

months was in the case of a person dying on or after the 30th of April, 1909, extended to three years (*r*); except as regards any surrender, assurance, divesting or disposition made or effected before the 30th of April, 1908, or for public or charitable purposes. Again, estate duty, where made a charge, is charged on the property in respect of which it is leviable (*s*): while succession duty is charged only on the successor's interest therein (*t*). And there is no provision similar to that made with regard to succession duty (*u*), charging estate duty on the proceeds of sale of settled property sold under a power of sale.

Estate duty on sale of lands under a power.

It appears, therefore, that if lands settled on one for life with remainder over be sold, either under a power of sale contained in the settlement, or under the Settled Estates Act, 1877, or the Settled Land Acts, and any unpaid estate duty be charged thereon, the purchaser must require this duty to be paid: otherwise the same will remain charged on the lands. For although the estate of those claiming under the settlement is destroyed by the exercise of the power (*x*), yet the charge given by the Finance Act, 1894, appears to be a charge on the lands, which is paramount to any estate therein of any subject of the Crown. When therefore the lien of the Crown for estate duty has attached on any lands, it appears to remain, until discharged by payment, so long as any subject has any estate therein; thus it would affect all estates created by the exercise of any express or statutory power, or arising on the escheat of the lands to any mesne lord (*y*). But as no estate duty, which may become payable on a future death, is charged on any lands, a purchaser of lands settled on one for life with remainder over will take the lands free from any charge in respect of the estate duty, if any (*z*), which will become payable on the death of the tenant for life; and this appears to be the case whether the

subsequently, by means of the surrender of the benefit reserved or otherwise, it is enjoyed to the entire exclusion of the deceased or such other person as aforesaid, and of any benefit to him by contract or otherwise, for such period preceding the death of the deceased as is provided by this section.

(*r*) See for example, *A.-G.* v. *Milne*, 1914, A. C. 765 (as to estate duty).

(*s*) Above, p. 1236.

(*t*) Above, p. 1201.

(*u*) Above, p. 1201.

(*x*) Above, pp. 1215, 1216.

(*y*) Cf. *Ellis* v. *R.*, 6 Ex. 921; Sug. V. & P. 521; and cases cited above, pp. 222, n. (*d*).

(*z*) See above, pp. 1238, 1239.

lands be conveyed to him under an express or statutory power, or by the tenant for life and remaindermen according to their estates therein (*a*). But if a remainder or reversion expectant on the determination of a life interest, other than a lease for lives (*b*), be sold, by itself and apart from the life interest, after the commencement of the Finance Act, 1894 (*c*), estate duty will become payable in respect of the property on the death of the tenant for life; and it appears that the purchaser will take subject to this liability, and must bear the expense of the duty, in the absence of stipulation to the contrary (*d*). The provisions of the Inland Revenue Act, 1889, barring the charge of succession duty after a certain lapse of time, in favour of a purchaser or mortgagee (*e*), are by the Finance Act, 1894 (*f*), directed to apply as if estate duty were therein mentioned as well. The remarks above made (*g*) as to a vendor's obligation, notwithstanding the Act of 1889, to prove the discharge of succession duty on deaths, which occurred more than twelve years before the sale, apply also to his obligation to prove the discharge of any estate duty, which became charged by reason of any such death on the property sold.

On sale of remainder or reversion.

Charge of estate duty as against purchaser.

The Finance Act, 1894, does not make estate duty a charge upon property which passes to the executor or administrator as such (*h*); so that estate duty is not a charge on any personal estate, which belonged absolutely to a deceased person and passes by his will or upon his intestacy, including leaseholds (*i*) and

Estate duty not charged on property passing to executor, as such.

Leaseholds.

(*a*) See *Cowley* v. *Inland Revenue Commrs.*, 1899, A. C. 198. And it seems that this is so even if the tenant for life die within three years, for the Finance Act, 1900, s. 11 (above, p. 1239), applies to surrenders, &c. to or for the benefit of any person entitled to an estate or interest in remainder in the property; and on a conveyance by the tenant for life and remainderman to a purchaser, the purchaser would not be a person so entitled.

(*b*) See above, p. 1225.

(*c*) See above, p. 1222.

(*d*) See above, p. 392, and n. (*c*).

(*e*) Above, pp. 1212, 1217.

(*f*) Stat. 57 & 58 Vict. c. 30, s. 8 (2); see Hanson, Death Duties, 172, 173, 6th ed.

(*g*) Above, p. 1217, and n. (*l*).

(*h*) Above, p. 1236.

(*i*) *Re Culverhouse*, 1896, 2 Ch. 251, deciding that the estate duty leviable in respect of leaseholds specifically bequeathed is payable out of the testator's general personal estate; and see *Re Clemow*, 1900, 2 Ch. 182, 194-196; cf., as to "testamentary expenses," *Porte* v. *Williams*, 1911, 1 Ch. 188; *Re Hudson*, ib. 206, 212 *sq.*; and see *Re Avery*, 1913, 1 Ch. 208 (reversionary interest in settled personalty); *Re Scott*, 1916, 2 Ch. 268 (foreign moveable assets).

his equitable interest transmissible as personalty in any real estate, which was prior to his death absolutely converted in equity into personal property (*k*). It will be remembered that the estate duty on such property is payable before the grant of probate or administration (*l*). The Court of Appeal decided, after an extraordinary conflict of opinion on the part of judges of first instance, that personalty appointed by will in exercise of a general power of appointment passes to the executor *as such*, and is so freed from any charge of estate duty (*m*). But this decision was overruled by the House of Lords in a subsequent case (*n*), and it was held that such personalty does not pass to the executor as such, and is therefore charged with the estate duty payable in respect thereof. The Finance Act, 1894, of course made estate duty a charge on all real estate passing by will or on intestacy (*o*). And it has been decided that in this respect the law was not altered by the Land Transfer Act, 1897, under which a deceased person's real estate passes, as a rule, to his executors or administrators, like a chattel real, and such personal representatives have the same power to dispose of real estate as they have of chattels real (*p*). That Act provides that nothing in Part I. thereof shall affect any duty payable in respect of real estate (*q*). Executors or administrators, who are now accountable as trustees (*r*) of any real estate vested in them under the Act for the estate duty leviable in respect thereof (*s*), are not therefore required to pay such estate duty before obtaining a grant of probate or administration, but have the option of paying the duty by instalments (*t*). And the duty is not payable out of the deceased person's general

(*k*) *I.e.*, any interest in real estate so converted on which probate duty was formerly payable; above, pp. 1189, 1190.

(*l*) Above, p. 1235.

(*m*) *Re Hadley*, 1909, 1 Ch. 20, reversing Parker, J., and overruling on this point *Re Treasure*, 1900, 2 Ch. 648, *Re Maddock*, 1901, 2 Ch. 372 (both Kekewich, J.), *Re Power*, 1901, 2 Ch. 659 (Byrne, J.), and *Re Dodson*, 1907, 1 Ch. 284 (Warrington, J.), and following *Re Moore*, 1901, 1 Ch. 691, *Re Dixon*, 1902, 1 Ch. 248, 257 (both Buckley, J.), *Re Fearnsides*, 1903, 1 Ch. 250 (Swinfen Eady, J.), and *Re Orlebar*, 1908, 1 Ch. 136 (Neville, J.).

(*n*) *O'Grady* v. *Wilmot*, 1916, 2 A. C. 231.

(*o*) Above, p. 1236.

(*p*) Above, pp. 211-215; *Re Palmer*, 1900, W. N. 9; *Re Sharman*, 1901, 2 Ch. 280.

(*q*) Stat. 60 & 61 Vict. c. 65, s. 5.

(*r*) Above, p. 1233.

(*s*) *Re Adams*, Kekewich, J., 3rd Aug. 1898, A. 592, cited Brickdale & Sheldon's Land Transfer Acts, 271, 2nd ed.

(*t*) *Re Sharman*, 1901, 2 Ch. 280, 283; see above, p. 1236.

personal estate, as in the case of leaseholds, but ought to be satisfied out of the real estate itself (*u*), the persons beneficially entitled to the land devised (*x*), or descended, bearing the actual burden of payment according to their interests therein (*y*). As estate duty still remains a charge on any real estate devised by will or descending upon death and intestacy, a purchaser thereof, whether from the deceased tenant's executors or administrator (*z*), or from the devisee or heir, should require the duty to be entirely discharged by the vendor before completing the sale (*a*). We may notice that, if the deceased person's estate were insolvent, no estate duty would be chargeable on his own property (*b*).

Lands devised on trust for sale.

Lands settled by deed on trust for sale.

Lands devised on trust for sale appear to be charged under the Finance Act, 1894, with the estate duty payable in respect thereof on the testator's death (*c*). Where lands have been settled by deed on trust for sale, so as to be converted in equity

(*u*) *Re Sharman,* 1901, 2 Ch. 280, 283; *Re Hacket,* 1907, 1 Ch. 385; *Re Spencer Cooper,* 1908, 1 Ch. 130; *Re Stamford & Warrington,* 1910, 2 Ch. 83. The estate duty payable in respect of a testator's realty is not a "testamentary expense" within the meaning of a direction to pay his testamentary expenses out of his residuary personalty or a mixed fund of residuary realty and personalty; *Re Sharman, Re Spencer Cooper,* ubi sup. But *secus* if the direction extends to "duties," *Re Pimm,* 1904, 2 Ch. 345; or "death duties," *Re Briggs,* 1914, 2 Ch. 413.

(*x*) See above, pp. 211, 1233-1235.

(*y*) See *Re Jolley,* 17 Times L. R. 244; *Re Parker-Jervis,* 1898, 2 Ch. 643; *Re St. Albans,* 1900, 2 Ch. 873, 881; *Re Hacket, Re Spencer Cooper, Re Stamford & Warrington,* ubi sup.; *Re Hartland,* 1911, 1 Ch. 459; *Re Palmer,* 1916, 2 Ch. 391.

(*z*) Above, p. 214. The Inland Revenue authorities at first considered that a sale of real estate by the personal representatives conveyed the same free from any charge of duty: but afterwards they asserted the contrary opinion; see 41 Sol. J. 308; 43 Sol. J. 765, 769, 812, 822; 44 Sol. J. 67, 72, 339, 343. There seems to be no doubt that the latter opinion is correct. An executor can sell leaseholds or other personalty free from any charge of duty, even before probate; above, pp. 213, n. (*r*), 1190, but that is because probate duty was not and estate duty is not made a charge on such property. The Finance Act, 1894, contains no provision shifting the duty on a sale; and the Crown is not bound by the Land Transfer Act, 1897; above, pp. 221, 1240. But it is considered that the executor's power of sale is paramount to the charge for estate duty on the death of a beneficiary under the will: for if the executor's power really remains exercisable, there can have been no assent to the devise, and hence no property can have passed on the death of the beneficiary.

(*a*) See above, p. 1236; and as to the duty on timber, trees or wood, above, p. 1222, n. (*n*).

(*b*) Above, pp. 1199, n. (*n*), 1222, n. (*n*).

(*c*) See 43 Sol. J. 765, 769; 108 L. T. Newspaper, 450.

into money, and the proceeds of sale have been directed to be held in trust for one for life and others in succession, no estate duty is charged on the lands before the tenant for life dies; so that if a sale be made before such death, the purchaser takes the lands free from any claim of duty (*d*). If, however, the lands remain unsold until the death of the tenant for life, the estate duty becomes leviable, for which the trustees would be accountable (*e*). And as the Finance Act provides that the duty shall be a first charge on the property in respect of which it is leviable (*f*), it appears to be a charge on the lands. For until the lands be sold, what other property is there on which the duty can be a charge? It must be remembered too that in such cases the *cestui-que-trusts* are entitled usually by express declaration (*g*), but, if not, by implication (*h*), to the rents and profits of the lands until sale for the like estates as they enjoy in the income of the proceeds of sale. So that on the death of the tenant for life the property passes, or must be deemed to pass, as there is a cesser of an actual interest in the lands. It is this event which causes the liability to duty (*i*); and the person next entitled succeeds to a like interest in the lands until sale. These considerations also support the view that the duty is a charge on the lands (*k*). It is thought, therefore, that on a purchase of land from trustees for sale, where the purchaser has notice that some person is dead, who was or might have been beneficially interested for his life in the rents and profits until sale (as where land has been settled on marriage in trust for sale with the husband's consent and he is dead), the purchaser is entitled to have the trusts of the purchase money sufficiently abstracted to show whether any charge of estate duty has attached thereon; and if it appear from such abstract that some person entitled for life under these trusts is dead, the purchaser should inquire as to payment of any estate duty leviable on such death and require it to be discharged. If, however, the purchaser have no notice of the death of any person, who was or might have been beneficially interested for life in the rents and profits until sale, it is thought that he may rely on the pro-

(*d*) See above, p. 1239.
(*e*) Above, p. 1233.
(*f*) Above, p. 1236.
(*g*) Williams on Settlements, 125.
(*h*) *Casamajor* v. *Strode*, 19 Ves. 390, n.
(*i*) Above, p. 1222.
(*k*) As to the official view, see above, p. 1243, n. (*z*).

visions of the Finance Act, 1894, that estate duty is not to be charged on property as against a *bonâ fide* purchaser thereof for valuable consideration without notice (*l*); and that he need not require the trusts of the purchase money, which form no part of his title, to be abstracted. As we have seen (*m*), when an equitable interest in lands settled on trust for sale passes to the executor or administrator *as such*, there is no charge of estate duty either on the proceeds of sale or on the land itself.

Lands subject to a general power of appointment.

It has been mentioned (*n*) that by the Finance Act, 1894, property passing on death is to be deemed to include property of which the deceased was at the time of his death competent to dispose by virtue of any estate or interest therein, or any general power exercisable by instrument *inter vivos* or by will, or both. If, therefore, any lands, whether freehold, copyhold or leasehold, be subject to a general power of appointment, which has not been validly exercised by instrument taking effect in the appointor's lifetime and in such a way as not to confer an interest arising on or by reference to the appointor's death (*o*), estate duty will be leviable in respect thereof on the appointor's death, whether he have exercised the power by his will or have not exercised it at all (*p*). In the case of real estate, such duty will be charged on the property (*q*). In the case of leaseholds the duty will be charged on the property, if the power were not exercised (*r*), and also if it were exercised; since it is now decided, as we have seen (*s*), that the property does not pass to the executor as such, so as to escape the charge of duty. And money which a person has a general power to charge on property is to be deemed property of which he has

General power to charge land with the payment of money.

(*l*) Above, p. 1236.
(*m*) Above, pp. 1241, 1242.
(*n*) Above, p. 1223, n. (*s*).
(*o*) Above, p. 1223, n. (*r*).
(*p*) *Cowley* v. *Inland Revenue Commrs.*, 1899, A. C. 198, 213; *Porte* v. *Williams*, 1911, 1 Ch. 188. Where the power is not exercised, or not exercised as to the whole property, the persons entitled in default of appointment will pay the duty according to their respective interests; *Re Hicklin*, 1917, 2 Ch. 278.
(*q*) Above, pp. 1236, 1241; *Porte* v. *Williams*, ubi sup.
(*r*) See *Porte* v. *Williams*, ubi sup.
(*s*) Above, p. 1242. Whether the power is exercised (*O'Grady* v. *Wilmot*, 1916, 2 A. C. 231, 258, 267, 274, overruling on this point, *Re Treasure*, 1900, 2 Ch. 648, 653; see *Re Fearnsides*, 1903, 1 Ch. 250, 258), or is not exercised (*Porte* v. *Williams*, ubi sup.; *Re Hudson*, 1911, 1 Ch. 206, 213), the estate duty in respect of the property is not a "testamentary expense."

power to dispose (*t*). This liability to estate duty must especially be borne in mind on the purchase from any person entitled in default of appointment to land made subject to a general power which has been extinguished by the appointor's death, whether the power were to appoint the land generally or to charge the same with the payment of money. Any property, whether real or personal, which is subject to a special power of appointment is chargeable with estate duty when it passes or is to be deemed to pass on death, either by virtue of an exercise of the power or in default of appointment (*u*): but not, as a rule, merely on account of the death of the appointor without exercising the power (*x*). If, however, the appointor were himself an object of the power, so that he could have appointed to himself some beneficial interest exceeding an estate for his own life in the property, it appears that estate duty will be leviable on his death although he should have made no appointment, for he was at the time of his death competent to dispose of the property for his own benefit; and where a man is empowered to appoint to himself, he has in effect a general power of disposition, since he may appoint to himself and then alien to any other person (*y*). Where a man has exercised a power of appointment or made any settlement or other disposition of property reserving a power of revocation, which is exercisable in his own favour, he appears to be competent to dispose of the property within the meaning of the Finance Act, 1894 (*z*), and estate duty is therefore chargeable on his death, if he die without exercising the power.

Property subject to a special power.

General power of revocation.

Death of joint tenant.

Devise to issue dying in testator's lifetime.

The reader may be reminded that estate duty is now payable on the death of any joint tenant beneficially entitled (*a*). And where a devise or bequest to any child or other issue dying in the lifetime of a testator is saved from lapse and takes effect by virtue of sect. 33 of the Wills Act (*b*), estate duty is payable, not only on the passing of the property by the testator's

(*t*) Above, p. 1223, n. (*s*).
(*u*) See above, p. 1223.
(*x*) It does not appear that in this case the appointor or any person to whom he might have appointed would have had an *interest* in the property ceasing on the death of the deceased; see above, pp. 1223, 1224.
(*y*) See above, p. 1223, and n. (*s*).
(*z*) Above, p. 1223; see also pp. 1219, 1223, as to settlements reserving a power of revocation.
(*a*) See above, pp. 1223, 1224.
(*b*) Stat. 7 Will. IV. & 1 Vict. c. 26.

death, but also on the further devolution of the property from the dead child or issue to those who become entitled thereto under his will or intestacy (*c*). Estate duty is also leviable on the cesser by death of a contingent interest in any property to the extent to which any benefit thereby accrues or arises (*d*). As we have seen (*e*), estate duty is, as a rule, payable on the death of any tenant for life or life annuitant under a settlement of whatever date; but if the settlement were made before the commencement of the Finance Act, 1894, estate duty was not payable (*f*) on deaths before the 16th August, 1914, in respect of any personal property comprised therein, on which probate or account duty had been paid, until the death of some person who was competent to dispose thereof. Estate duty was, however, payable on any such death of a tenant for life or life annuitant under such a settlement, in respect of any realty so settled (*g*). This exemption of personalty was abolished as to deaths after the 15th August, 1914, except as above mentioned (*h*).

Cesser of contingent interest.

Death of life tenant under settlement made before the Finance Act, 1894.

Where any property, real or personal, is charged with estate duty, the charge is in general upon the inheritance or *corpus* thereof (*i*); the executors or administrators, or the trustees, or else the persons beneficially entitled in possession (as the case may be), are accountable for and must pay or procure payment of the duty (*j*); but, as we have seen (*k*), the ultimate burden of payment is borne by the persons beneficially entitled in proportion to their respective interests. Thus, where estate duty becomes charged on land which is comprised in a settlement charging a jointure rent-charge and portions, and subject thereto limiting a life estate with remainders over, the charge is upon

Estate duty, how borne as between those beneficially entitled.

(*c*) *Re Scott,* 1901, 1 K. B. 228.
(*d*) Above, pp. 1223, 1224; *A.-G.* v. *Wood,* 1897, 2 Q. B. 102, 105-107.
(*e*) Above, pp. 1226, 1238, 1244.
(*f*) Save in the cases contemplated by the amending stat. 10 Edw. VII. c. 8, s. 55; above, p. 1226, and n. (*k*).
(*g*) *Berry* v. *Gaukroger,* 1903, 2 Ch. 116; *A.-G.* v. *Londesborough,* 1905, 1 K. B. 98.
(*h*) Above, pp. 1227, 1232.
(*i*) Where lands and heirlooms are settled together, the settlement is treated for purposes of estate duty as one settlement, and interest on unpaid duty on the heirlooms is payable during the life of a tenant for life out of the income of the estate; *Re Egmont's S. E.,* 1912, 1 Ch. 251.
(*j*) Above, pp. 1233-1236.
(*k*) Above, p. 1243.

the inheritance and is paramount to all these interests; but the payment of the capital sum leviable for estate duty falls upon the portioners and the remainderman in fee in proportion to the amount of the portions and the value of the land, whilst the interest payable in respect of the duty, if paid by instalments (*l*), and of any mortgage or charge necessary to raise the duty must be paid by the jointress and tenant for life proportionately, the jointress being treated as tenant for life of such a portion of the land (as valued for the purposes of the duty) as would produce an income equal to the amount of her jointure (*m*). And where any persons entitled to any annuity or capital sum charged on any property are so bound to bear the burden of any estate duty, the amount with which they are chargeable in respect of the duty may be deducted by the person accountable therefor before payment to them of the annuity or capital sum (*n*). This must be borne in mind in all dealings by such persons with their annuities or capital sums so charged, whether by way of sale or mortgage. As already mentioned (*o*), any person authorised or required to pay any estate duty may raise the amount necessary by sale or mortgage of the property. And in the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorised or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise), under a disposition not containing any express provision to the contrary (*p*). Where any sum so charged is

(*l*) Above, p. 1236.

(*m*) *Re Parker-Jervis,* 1898, 2 Ch. 643; *Re St. Albans,* 1900, 2 Ch. 873; *Re Howe's Settled Estates,* 1903, 2 Ch. 69; *Berry* v. *Gaukroger,* 1903, 2 Ch. 116; *Re Hacket,* 1907, 1 Ch. 385; *Re Charlesworth's Trusts,* 1912, 1 Ch. 319; *Re Hicklin,* 1917, 2 Ch. 278; and as to the proportion of estate duty in respect of a mortgage of a testator's realty to the trustees of his child's marriage settlement, see *Re Hartland,* 1911, 1 Ch. 459; *Re Briggs,* 1914, 2 Ch. 413. So, where real and personal estate is devised on trust for sale and out of the proceeds to pay legacies, that proportion of the legacies which is payable out of the proceeds of the realty must bear a rateable part of the estate duty; *Re Spencer Cooper,* 1908, 1 Ch. 130. See also *Re Stamford & Warrington,* 1910, 2 Ch. 83. The like law prevails with regard to settlements of personalty; *Re Orford,* 1896, 1 Ch. 257; *Re Meyrick,* 1897, 1 Ch. 99; *Re St. Albans,* ubi sup.; see *Re Palmer,* 1916, 1 Ch. 395.

(*n*) *Re St. Albans,* 1900, 2 Ch. 873, 881.

(*o*) Above, p. 1236.

(*p*) Stat. 57 & 58 Vict. c. 30, s. 14 (1); *Re Hartland,* supra; *Re Briggs,* supra; *Re Palmer,* supra.

expressly made payable without any deduction, the person in whose favour the same is charged is not bound to bear any portion of the estate duty, which will then fall entirely on those interested in the property subject to the charge (*q*).

Where the property passing on death is not the whole estate or interest.

If the property which passes on the death be not the whole estate or interest in some land or chattel, as where an equity of redemption only so passes, the estate duty is charged on that property only, and not on the paramount estate or interest, such as the estate of the mortgagee (*r*). And there can be no doubt that in the example given the mortgagee exercising his power of sale could convey the property to a purchaser free from any charge of the estate duty which became payable in respect of the passing on death of the equity of redemption (*s*). So, if an estate in remainder or reversion pass on death, that estate only appears to be chargeable with the estate duty, which is payable, at the option of the person accountable therefor, either immediately or when the estate falls into possession (*t*).

Certificate of discharge should be required.

Whenever any estate duty has become charged on any property, an intending purchaser or mortgagee thereof should require the production of a certificate of discharge of the duty (*u*), such certificate (and not the certificate of payment of (*x*) or the receipts for the duty) being the right evidence that the property is freed from the charge (*y*). It should be noted,

(*q*) *Re Parker-Jervis,* 1898, 2 Ch. 643; *Re Fitzhardinge,* 80 L. T. 376; *Re Maryon-Wilson,* 1900, 1 Ch. 565; *Re Egmont's S. E.,* 1912, 1 Ch. 251; see *Re Palmer,* 1916, 2 Ch. 391; *Re Wedgwood,* 1921, 1 Ch. 601; *Re Sutherland,* 1922, 2 Ch. 782.

(*r*) See *Cowley* v. *Inland Revenue Commrs.,* 1899, A. C. 198; *A.-G.* v. *Montagu,* 1904, A. C. 316.

(*s*) See *R.* v. *Lamb,* 13 Pri. 649.

(*t*) See stat. 57 & 58 Vict. c. 30, ss. 5 (2), (3), 7 (6), 22 (1) (j); above, pp. 1237, 1238. It is a question whether, if land be settled on A. for life with remainder to B. in fee, and B. dies before A., and his heir or devisee elect not to pay the estate duty until A.'s death, the land can in A.'s lifetime be conveyed free from the charge of estate duty on a sale either by A. under the Settled Land Acts or in exercise of a power of sale contained in the settlement. It appears on principle that, if the duty be indeed charged on B.'s estate only, the land should, on a sale under either power, be freed therefrom and the charge shifted to the interest of B.'s heir or devisee in the proceeds of sale; above, pp. 1214, 1215, and n. (*a*); unless the application of the ordinary rule is excluded by the doctrine of the prerogative of the Crown; see *Ellis* v. *R.,* 6 Ex. 921, 926.

(*u*) See above, p. 1237.

(*x*) See stat. 57 & 58 Vict. c. 30, s. 9 (2).

(*y*) 1 Key & Elph. Prec. Conv. 471, n., 8th ed.; 553, 10th ed.

however, that even a certificate of discharge is no evidence that the property is free from all incumbrance in respect of estate duty. As above stated (*z*), where a person having a limited interest in any property pays the estate duty in respect thereof, he will be entitled *to the like charge as if the estate duty in respect of that property had been raised by means of a mortgage to him.* It has been held that this charge arises by the mere fact of such payment of the duty, and further that it confers a legal and not only an equitable interest on the chargee (*a*). It is necessary, therefore, on every sale or mortgage of land which has become chargeable with estate duty, not only to inquire whether the duty has been paid (*b*), but also to ascertain that there is no charge subsisting by reason of the duty having been paid by a person who had a limited interest in the land.

Charge where duty paid by person having a limited interest.

Payment of estate duty should be stated in the abstract.

It has been held in Ireland that the fact of the payment of any estate duty, as well as succession duty, which has become charged on any land sold, ought to be stated in the abstract of title; and that the vendor is bound to obtain a certificate of the discharge of such estate duty at his own expense (*c*). We have already commented on this decision in connexion with succession duty (*d*). It is respectfully submitted that it is correct, as regards the vendor's duty to state in the abstract the payment of estate duty (*e*), and to prove such payment: but that, as regards the *expense* of proving such payment, if the vendor has no certificate of discharge in his possession, the purchaser is bound, under the Conveyancing Act, 1881, to pay the expense of procuring it (*f*).

Expense of procuring certificate of discharge of estate duty.

(*z*) Above, p. 1236.

(*a*) See *Re Laurie*, 1898, W. N. 136; *Lord Advocate* v. *Moray*, 1905, A. C. 531, 539, 541, 542; above, p. 1236, n. (*r*).

(*b*) Above, pp. 162, 1189.

(*c*) *Re Conlon & Faulkener's contract*, 1916, 1 I. R. 241. The above decision as to the expense of the certificate seems to have been given on the ground that there was not in fact any expense involved in obtaining it; see above, pp. 1217, 1218, and n. (*p*).

(*d*) Above, pp. 1217, 1218.

(*e*) It has not hitherto been the practice in England to do so.

(*f*) See stat. 44 & 45 Vict. c. 41, s. 3 (6); above, pp. 33, 43, 124, 125, 1217, 1218, and n. (*p*). It is submitted that in this case the certificate of discharge is not in itself a part of the vendor's title (as was the certificate in *Re Moody & Yates' contract*, 30 Ch. D. 344), but is merely evidence of fact (*i.e.*, payment of the duty) which is part of such title; see *Re Wright & Thompson's contract*, 1920, 1 Ch. 191.

Increment Value Duty payable on death.

It has been mentioned (*g*) that by the Finance (1909-10) Act, 1910 (*h*), a new duty called Increment Value Duty (now abolished (*i*)) was charged on the increment value of any land, and made payable, amongst other occasions, on the occasion of the death of any person dying after the commencement of the Act, where the fee simple of the land or any interest in the land (*j*) was comprised in the property passing on the death of the deceased within the meaning of the enactments cited below of the Finance Act, 1894 (*k*), as amended by any subsequent enactment. By the Finance Act of 1910 (*l*), the provisions as to the assessment, collection and recovery of estate duty under the Finance Act, 1894 (*m*), applied as if increment value duty to be collected on the occasion of the death of any person were estate duty; but, where any interest in land (*n*) in respect of which increment value duty was payable was property passing to the personal representative as such (*o*), the duty was payable out of that interest in land in exoneration of the rest of the deceased's estate, and was collected upon an account to be delivered by the personal representative, setting forth the particulars of the increment value in respect of the property; provided that in respect of all property of the deceased, other than that assessed to increment value duty, the Crown should, as a creditor in respect of such increment value duty, rank *pari passu* with the other creditors of the deceased. It appears that the above-mentioned provisions of the Finance Act, 1894 (*p*), included the enactment making the duty in respect of any pro-

(*g*) Above, pp. 661-666, 669, n. (*n*).

(*h*) Stat. 10 Edw. VII. c. 8, s. 1 (*b*), passed 29th April, 1910; above, p. 662, and n. (*b*). See also sects. 2 (2, *c*), 3, 14 (4), 22 (as to minerals leased or worked), 36, 62; and as to the exemptions from such duty, sects. 7-10, 35, 38, above, p. 662, n. (*a*). By sect. 11, where a building was used for the purpose of separate tenements, flats or dwellings, the passing on death of any lease of any such separate tenement, flat or dwelling was not an occasion on which increment value duty was to be collected under this Act; see above, p. 663, n. (*d*).

(*i*) Below, p. 1254.

(*j*) As to the meaning of the words *land*, *interest* and *fee simple* in this part of the Act, see sect. 41; above, p. 662, n. (*c*); as to settled land, see sect. 3 (4).

(*k*) Stat. 57 & 58 Vict. c. 30, ss. 1, 2 (1, *a*, *b*, *c*, 3); see above, pp. 1223, 1224.

(*l*) Stat. 10 Edw. VII. c. 8, s. 5.

(*m*) These appear to be stat. 57 & 58 Vict. c. 30, ss. 6-10.

(*n*) See above, n. (*j*).

(*o*) See above, pp. 1235, 1236, 1241, 1242.

(*p*) See above, n. (*m*).

perty, which did not pass to the executor as such, a charge thereon (*q*). It is thought, therefore, that while the duty remained chargeable purchasers of land had to have regard to any increment value duty which might be so charged thereon, and had to require their vendors to discharge any such duty before completion of the sale. And it appears further that, as regards any interest in land (*r*) capable of passing to the personal representative as such (*e.g.*, leaseholds (*r*)), a purchaser of such property had to require proof that any increment value duty which had become payable in respect thereof had been duly discharged; as the duty was payable out of that interest in exoneration of the rest of the deceased's estate (*s*).

Power to charge increment value duty or reversion duty on land settled or vested in trustees.

By the Finance (1909-10) Act, 1910 (*t*), where the fee simple of any land, or any interest in land (*u*) in respect of which increment value duty or reversion duty (*x*) was charged, was settled land within the meaning of the Settled Land Act, 1882, or was vested in a trustee, and the tenant for life, or person having the powers of a tenant for life, or the trustee, was the person who was liable to pay any sums on account of either of these duties, he was entitled to charge by deed upon the land or interest in land any amount paid by him, or which he might then be or might thereafter become liable to pay, in respect of either of these duties, and the amount of any expenditure which he might have reasonably incurred in connection with the valuation, and the benefit of any such charge might be transferred in like manner as a mortgage (*y*). In the case of settled land a deed executed for the purposes of this section was not to take effect until notice thereof had been given to the trustees of the

(*q*) Stat. 57 & 58 Vict. c. 30, s. 9 (1); above, pp. 1235, 1236.

(*r*) See above, n. (*j*), p. 1251.

(*s*) Above, p. 1251.

(*t*) Stat. 10 Edw. VII. c. 8, s. 39.

(*u*) See above, p. 1251, n. (*j*).

(*x*) See above, pp. 383, 661-667, 669.

(*y*) Sect. 39, sub-sect. 1. By sub-sect. 3, sects. 59, 60 and 62 of the Settled Land Act, 1882 (which relate to the exercise of powers on behalf of infants and lunatics), were to apply to the exercise of the power under this section in the same manner as they applied to the exercise of the powers of a tenant for life under that Act; see above, pp. 853, and n. (*l*), 868, and n. (*g*). The increment value duty and reversion duty, and expenses incidental thereto, were payable out of capital; *Re Smith-Bosanquet's S. E.*, 107 L. T. 191; *Re Maryon-Wilson's S. E.*, 1915, 1 Ch. 29.

settlement for the purposes of the Settled Land Act, 1882 (*z*). Where the fee simple of any land, or any interest in land (*a*) in respect of which increment value duty or reversion duty was charged, was vested in a mortgagee who was liable to pay any sum on account of either of those duties, he was entitled to add to his security the sum for which he was so liable, including any costs or expenses properly incurred by him in respect of the payment of the duty (*b*).

Charge for increment value duty payable on a sale.

The construction of the above provisions gave rise to difficulty in the case of increment value duty payable on the occasion of a transfer on sale (*c*). The power was to charge the amount paid for duty on "the land," which according to the wording of the Act appears to mean the land previously referred to, that is, the land in respect of which the duty is charged. This, of course, would in the above case be the land *sold*. It is thought, however, that the enactment would not be construed as enabling the land sold to be so charged with the duty in the purchaser's hands. Where a part only of land settled or vested in trustees was sold, it might possibly be considered that the Act empowered the duty to be charged on the land remaining unsold: but it would not be satisfactory for an intending transferee of the charge to advance money on the assumption that the Act would be so construed, without an actual decision to this effect. When the whole of land settled or vested in trustees was sold, the further question arises whether the above enactment enabled the duty to be charged on the purchase money. It will be observed that the enactment above quoted (*d*) enabled a charge to be given prospectively for the amount of duty which the chargor might thereafter become liable to pay. When such a prospective charge was given by a tenant for life or by a person having the powers of a tenant for life under the Settled Land Acts, it appears that it could be displaced by his conveyance of the settled land under the power of sale or any of the other powers given to him by the Settled Land Act, 1882 (*e*), except so far as it had become a security for any money actually raised

Prospective charge of such duty.

(*z*) Sect. 39, sub-sect. 3.
(*a*) See above, p. 1251, n. (*j*).
(*b*) Sect. 39, sub-sect. 4.
(*c*) See above, pp. 661 *sq.*
(*d*) Above, p. 1252.
(*e*) Stat. 45 & 46 Vict. c. 38, s. 20; see above, pp. 287, 288, 298 *sq.*

or paid for duty at the date of the deed of conveyance. Money might be so raised or paid for the increment value duty chargeable on the transfer on the sale. Purchasers of settled land so prospectively charged from the tenant for life or a person with the powers of a tenant for life selling under the Settled Land Acts had, therefore, to ascertain if any money had actually been raised or paid under the charge before the date of the conveyance of the land to them; and if so, it was necessary to obtain an express release of the charge from the person so entitled to the benefit thereof (*f*). Where such a prospective charge had been created by a trustee, who subsequently sold the land so charged and proposed to convey it by virtue of his estate therein or some express power thereover, the purchaser had equally to inquire whether any money had been raised or paid and was owing on the security of the charge; and he had to require the charge to be expressly released, whether any money had actually been raised or secured thereunder or not. For if the vendor were entitled to the charge for his own use to secure the repayment of money paid out of his own pocket, but subject thereto held the land and would take the purchase money as trustee, a question might arise whether his conveyance of the land without expressly releasing the charge would vest the land in the purchaser free from the charge (*g*).

Abolition of increment value and reversion duties.

By the Finance Act, 1920 (*h*), increment value duty and reversion duty were abolished; they ceased to be chargeable as from the commencement of that Act; any such duties which had been assessed at the date of the commencement of that Act, but were unpaid at that date, were not to be collected, and any moneys already paid on account of those duties were made recoverable at any time within six months after that date. It seems clear that all charges existing at the date of the commencement of that Act on any land *in favour of the Crown* for unpaid increment value duty payable on death ceased on the passing of that Act. But it appears that, where any such charge previously created in favour of the Crown had been paid off before the passing of the Act in such circumstances that the person paying off the charge, or advancing the money to do so, had acquired a substituted charge on the land for the amount of

(*f*) See above, pp. 307-310.
(*g*) See above, p. 610, and cases cited in n. (*o*).
(*h*) Stat. 10 & 11 Geo. V. c. 18, s. 57, passed 4th Aug. 1920.

the money so paid or advanced, it may still be material to ascertain whether the substituted charge was properly acquired and is valid. Thus where a person having a limited interest in the property charged had paid the increment value duty and thereby acquired the like charge as if the duty had been raised by means of a mortgage to him (*i*), it does not appear that this charge ceased on the passing of the Act of 1920; and the question of the validity of the charge so acquired according to the law in force at the date of its acquisition remains after the Act as a permanent part of the title to the land so charged. So where charges have been created for money actually raised or paid under the above mentioned power to charge increment value duty or reversion duty on land settled or vested in trustees (*k*), these charges are not extinguished by the Act, and the question, whether they were properly created, remains as a permanent part of the title. For this reason, the above statement (*l*) of the law previous to the Finance Act, 1920, and of the questions arising thereunder has been retained in this edition.

(*i*) See above, pp. 1236, 1250, 1251, and n. (*m*).
(*k*) Above, pp. 1252-1254.
(*l*) Above, pp. 1251-1254.

APPENDIX (D).

(*Referred to above, page* 1138.)

SEARCH IN BANKRUPTCY ON THE SALE OF REGISTERED LAND.

The author's principal reason for advising that a search in bankruptcy should be made before completing a sale of registered land, is the enactment in the Land Transfer Act, 1897 (*a*), that, where a registered disposition would if unregistered be absolutely void, the register shall be rectified, and the person suffering loss by the rectification shall be entitled to an indemnity. When the registered proprietor of registered land is adjudged bankrupt, all his property, and the capacity to exercise all such powers over or in respect of property as might have been exercised by him for his own benefit at the commencement of his bankruptcy or before his discharge, vest in the trustee in the bankruptcy as from the date of the commission of the act of bankruptcy (if only one), on which the receiving order was made, or of the first of several acts of bankruptcy proved to have been committed by him within three months before the presentation of the bankruptcy petition on which such an order was made (*b*). The trustee is entitled to be registered as proprietor of the land in place of the bankrupt after it has been certified by the Court having jurisdiction in bankruptcy that the land is part of the bankrupt's property divisible amongst his creditors; and the official receiver is entitled to be registered pending the appointment of a trustee (*c*). Where the bankrupt is entitled to any land registered in his name for his own use, the

Effect of the bankruptcy of the registered proprietor of registered land.

(*a*) Stat. 60 & 61 Vict. c. 65, s. 7 (2); above, p. 1161.

(*b*) Stat. 4 & 5 Geo. V. c. 59, ss. 18, 37, 38, replacing 46 & 47 Vict. c. 52, ss. 20, 43, 44; 53 & 54 Vict. c. 71, s. 20; above, p. 377, n. (*t*).

(*c*) Stat. 38 & 39 Vict. c. 87, s. 43, amended by 60 & 61 Vict. c. 65, First Schedule; see Land Transfer Rules (1903), 193-200.

legal estate therein appears to pass, with his other property, to the trustee: but until the trustee is registered as the proprietor, the bankrupt remains the registered proprietor of the land, and appears, as such, to retain the statutory *powers* (*d*) of disposition of the land by way of registered transfer for value and registered charge (*e*). It seems therefore that, but for the above mentioned enactment of the Land Transfer Act, 1897 (*f*), a purchaser of registered land would be enabled to rely on the extinguishing effect of a registered transfer for value (*g*) to destroy any estate or interest, which would be outstanding in the trustee, if the transferor were a bankrupt; and that the purchaser would not be obliged to search in bankruptcy. This enactment, however, raises a difficulty. No doubt if the sale were completed before the date of any receiving order made against the vendor and without notice to the purchaser of any available act of bankruptcy on the vendor's part, the transaction would be perfectly valid and unimpeachable by virtue of sect. 45 of the Bankruptcy Act, 1914 (*h*). This section, however, only protects payments and conveyances made before the date of the receiving order. If a receiving order should have been made against the registered proprietor of registered land, and he should afterwards execute a registered transfer for value, and should then be adjudged bankrupt, it appears that the registered disposition is one which if unregistered would be absolutely void (*i*). If so, it seems that the trustee in the bankruptcy would be entitled to claim rectification of the register under the above mentioned enactment (*f*), and the purchaser would have to give up the land and rest satisfied with his claim to an indemnity under the Land Transfer Act, 1897 (*k*). The same difficulty might arise if the registered proprietor of the land sold were an undischarged bankrupt at the date of the contract for sale, unless the property sold had been acquired by or had devolved upon him since the commencement of the bankruptcy (*l*). Until these difficulties are dissolved by decision, it is thought to be advisable to search in bankruptcy before completing any sale of registered land; as the last thing that a purchaser would desire is to be immediately ejected

Where the vendor of registered land is an undischarged bankrupt.

(*d*) Above, p. 1126.
(*e*) Above, p. 1112, n. (*c*).
(*f*) Above, p. 1257, n. (*a*).
(*g*) Above, p. 1126.
(*h*) Stat. 4 & 5 Geo. V. c. 59, replacing 46 & 47 Vict. c. 52, s. 49; above, p. 516.
(*i*) Above, p. 521, and n. (*s*).
(*k*) Stat. 60 & 61 Vict. c. 65, s. 7. It should be noted that by subsect. 3 a person shall not be entitled to indemnity for any loss where he has caused or substantially contributed to the loss by his act, neglect, or default. This furnishes an additional reason for making the search.
(*l*) See above, pp. 522, 523.

and relegated to a claim for the statutory indemnity. It follows that, where a purchaser of registered land receives notice, before completion, of an act of bankruptcy committed by the vendor, he cannot safely proceed with the sale, except under the same conditions as would enable him to complete the contract if the land were not registered (*m*). It is thought that search in bankruptcy should certainly be made before advancing any money on the security of a registered charge on registered land; as no extinguishing effect is expressly given to such charges (*n*).

Notice of an act of bankruptcy by the vendor, pending completion of a sale of registered land.

Search in contemplation of a mortgage.

It is thought to be unnecessary to make any search for deeds of arrangement (*o*) on the sale or mortgage by transfer of registered land. If the trustee and creditors thereunder choose to be satisfied with an unregistered assurance (not protected by restriction or caution) of the debtor's estate in his registered land, and allow him to remain registered as the proprietor of the land, it is thought that any estate or interest outstanding in the trustee or the creditors would certainly be extinguished by the effect of any subsequent registered transfer for value executed by the debtor (*p*), and would be postponed to any registered charge which he might afterwards make (*q*).

Deeds of arrangement.

(*m*) Above, pp. 519-522.
(*n*) See above, pp. 1173 *sq.*
(*o*) Above, pp. 561, 564.
(*p*) Above, p. 1126.
(*q*) Above, p. 1132, n. (*x*).

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